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CASSELL'S

FAMILY LAWYER

BEING

*A POPULAR EXPOSITION OF THE CIVIL LAW OF  
GREAT BRITAIN*

BY

A BARRISTER-AT-LAW

SPECIAL EDITION

WITH FULL-PAGE ILLUSTRATIONS AND FACSIMILES OF LEGAL DOCUMENTS

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# THE FAMILY LAWYER.

## Book III. (continued)

### CHAPTER V.

#### COMPANIES.

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**T**HERE are four things of importance to the average man in connection with Company law. The first is, how to form a Company if you want to do so. The second is, what points to look out for before embarking your money; and how to tell what your liability is, when it begins and when it ends. The third is, how a Company ought to be conducted when it is formed, and what are the rights of members. And the fourth is, how to get redress if you have been swindled by promoters, directors, or others of that kidney.

#### I. THE FORMATION OF A COMPANY

is the first in order of date; and it is a matter of considerable importance. Many people nowadays, as it is commonly said, "turn their businesses into companies." This is done, sometimes, with the fraudulent intent of escaping the payment of just and lawful debts. At other times it is done as a matter of speculation. Again, it may be done with the object of developing a small business and

expanding it by introducing more capital ; and yet again, it may be done for purposes of convenience.

For instance, Hardup, the haberdasher, considering his business position, finds that he owes £1,000 to his creditors ; that his stock-in-trade is worth £200 ; and that his balance at the bank is *nil*. When creditors begin to press, he must either go into the Bankruptcy Court, or else suffer them to recover judgment and take his little all. And what will poor Hardup do then, poor thing ? A brilliant idea strikes him. He will convert himself into a limited liability company. So he holds a meeting of himself, his wife, his son, his daughter, his wife's sister, his bedridden aunt, and an impecunious friend—seven in all ; and they agree, *nem. con.*, to form a company with a capital of £500 (500 shares of £1 each), to purchase Hardup's business. So they sign a memorandum of association, each of the seven undertaking to take one share in the business. Hardup is to be managing director ; and his impecunious friend secretary. "But," you will say, "how can they purchase Hardup's business when they have no money ?" I will tell you. The business is purchased, not for cash, but for shares. In other words, Hardup agrees to accept as the purchase price of his business 493 fully paid-up shares in "Hardup's Haberdashery Stores, Limited."

When the new managing director's old creditors begin to press for payment and hint at the possibility of "writs" and "diligence" and so on, Hardup casually remarks that he has nothing upon which the officer of the law can lay a finger because the shop and stock now belong to "Hardup's Haberdashery Stores, Limited." The creditors can, of course, make Hardup a bankrupt, or take his shares and sell them ; but they cannot touch the "salary" he receives as manager of the company. Besides this, the company frequently issues debentures (see p. 633) to Hardup ; and a debenture holder has first claim on the company's assets before ordinary creditors. This is the *modus operandi* of the modern swindler—a new way to cancel old debts.

The second case is when Mercator, wishing to retire, or for some other reason being desirous of getting rid of his business, promotes a company to buy it from him. He sells for as much as he can get ; and subscribers have only themselves to thank if they pay more than the concern is worth ; for if an agreement has been made on behalf of the company to buy at a fixed price, any subscriber may see that agreement and investigate the matter for himself.

Turning a business into a company for purposes of development is quite a common practice. It happens when Veloper has struck on a line of business that is remunerative, or at all events promises well, but in order to develop the concern properly more capital is required than Veloper can supply. Thus, Veloper has invented or bought a patent saddle for bicycles. This saddle is soon discovered to be the best in the market and the demand for it becomes so great that Veloper cannot cope with it. He has no ready money to buy more plant. He does not care about borrowing ; but he places his business on the market and asks the public to take shares in order that the demands of the cycle trade may be adequately met.

Lastly, a business is turned into a company for purposes of convenience for many reasons. The chief of such reasons is that it is more easy to dispose



of the shares in a business than to divide a business that is private. To explain: Mr. Holster has a furniture shop in Tottenham Court Road, where he drives a roaring trade. In course of time the business grows to such an enormous extent that it is worth half a million of money. Now, Mr. Holster has two sons and a daughter, and he wants to leave to each of these a share in the concern. If he did this as the business stands, he could only do it by making them partners, and this might be inconvenient for many reasons. For instance, Miss Holster married Captain Dashaway, and is rather flighty; and if she became a partner she could only be a sleeping partner. Moreover, her husband might instigate her to be foolish; and so bring on quarrels, a dissolution of partnership, and perhaps a smash-up. Wherefore Holster forms a limited liability company, with a capital of £300,000 divided into 3,000 shares of £100 each. To make up the seven necessary to form the company, he buys ten shares each for his children, one for Dashaway, ten for Mrs. Holster, one for his faithful old confidential clerk, and takes the other 2,958, representing £295,800 of the capital, for himself as the price of the business, stock-in-trade and goodwill. Now we have "Holster, Limited," instead of plain Holster. When he makes his will, the good man can dispose of his concern with the greatest ease. For instance, he can leave ten shares to his old confidential clerk, as a legacy; one each to half-a-dozen other old servants who have helped him build up his trade; 500 to his widow for her life, and after her death amongst his children; and the remaining shares he can distribute amongst his three children as he pleases. Then if any one of the children is fractious, he or she must submit to the decision of the majority of the shareholders, or else can sell the shares. He or she cannot break up the concern as a partner could.

**One-man companies.**—An unpleasant sensation was caused in certain circles by a decision of Mr. Justice Vaughan Williams in the case of *Broderip v. Salomon*. Mr. Salomon had formed a sort of "one-man company" to purchase his own business; and he himself held a number of debentures. Debentures, like mortgages or bonds, are a first charge on property. That is to say, the holder of debentures has the right, if his interest or principal be not paid, to seize and sell (by leave of the Court) the whole assets of the company wherewith to pay himself. And he is paid in full before any other creditors or shareholders. In this particular case it was decided by Mr. Justice Vaughan Williams and the Court of Appeal that the company formed by Salomon was not formed *bonâ fide*, but with the intention that Salomon should be able to carry on his trade under cover of limited liability, and that the company was merely Salomon's agent. As I have pointed out in the chapter on Agents (p. 546), an agent can always make his principal indemnify him—that is, pay any losses sustained in transacting the principal's business. So that it came to this: the company being merely Salomon's agent, Salomon was, in the end, liable to recoup the company any loss sustained. Moreover, it was very doubtful whether the so-called company was a company at all, seeing that it had not been formed in good faith.

But the House of Lords declined, in manner most emphatic, to accept any such view. So long as the requirements of the Companies Acts were fulfilled

(i.e. the Company was properly registered, and so on), no more could be said. Salomon was not the company's principal; and, therefore, was not bound to pay its losses. And, to be just to Mr. Salomon, it should be said that the Lord Chancellor quite acquitted him of fraudulent intent. (*Times*, November 17, 1896.)

**What to do in forming a company.**—There are two methods of procedure. One is to advertise the object or scheme of the proposed company, and invite applications for shares, with the notion of not forming the company at all unless a certain number are applied for. The other is to register the company first, and then to invite applications for shares.

It should be noted that no company can be formed under the Companies Acts (1862 to 1890) unless **at least seven persons** join. Next, you should observe that these persons can associate for the purpose of forming a company so long as the object is lawful (C.A., 1862, s. 6).<sup>\*</sup> You see, it is not like partnership. As I have pointed out in the previous chapter, you can only form a partnership with the object of "business with a view of profit" (Partnership Act, 1891, section 1). But if you and six other persons wish to form an association for purposes other than business and profit, you may do it provided you register yourselves as a company. This is often done in the case of literary, scientific, and religious associations, football and cricket clubs, political and social clubs, and other bodies of that kind, whose object is not trade, commerce, or pecuniary profit.

**The advantages of incorporation** when you wish to form a society of the kind just mentioned are numerous. Take the case of an ordinary social club, for example, where the expenditure and general business arrangements are carried on by a committee of members—one of those clubs called "non-proprietary" (p. 565). I was a member of one once. We had a palatial clubhouse in the West End, luxuriously furnished. Our wines were famous and our *chef* was renowned. We elected a committee annually and this committee had most magnificent ideas. There was nothing petty or mean about them. Result: the club one day found that its liabilities exceeded its assets by about £5,000 or £6,000. Then there was a panic. Members began to resign, which only made matters worse by reducing the takings of the club. Very soon writs began to come in with most unpleasant frequency. The electric light company, the landlord, the wine merchant, all invoked legal aid. They could not sue the club, because the club, as such, had no legal existence. It was not a partnership, because it was not a business carried on for profit. Neither was it a legal corporation, because it had never been registered as a company. Therefore, every single member was liable for every penny of that £5,000 or £6,000. As a matter of fact, each creditor picked out about half-a-dozen wealthy members and sued them.

*Experientia docet*, saith the Latin grammar; and one of the lessons to be learned from this experience of mine is that the best and safest kind of club to join is one in which you become a member with limited liability. And the only way in which this can be done (except in the case of proprietary clubs) is to

\* "C.A." will henceforth be used as an abbreviation for "Companies Act."



join a club which is a company incorporated under the Companies Acts, with limited liability. Say that every member takes one £5 share. Then you know that so long as you pay your annual subscription you can never be called upon to answer for more than the amount of your share, and this cannot exceed £5.

**Memorandum of association.**—When you have found your seven persons, the next thing to do is to draw up the memorandum of association. This is a document containing in a short but comprehensive form the following particulars (C.A., 1862, section 8):—

(1) The name of the proposed company, with the addition of the word "Limited" as the last word in such name.

(2) The part of the United Kingdom, whether England, Scotland, or Ireland, in which the registered office of the company is proposed to be situate.

(3) The objects for which the proposed company is to be established.

(4) A declaration that the liability of the members is limited.

(5) The amount of capital with which the company proposes to be registered, divided into shares of a certain fixed amount.

To this document each of the seven subscribes his name in the presence of a witness; and the witness signs his name also.

Each of the seven must take at least one share and he must write opposite to his name the number of shares he takes. The common practice is for each one to put himself down on the memorandum for one share only; for there is nothing to prevent him from applying for more afterwards. Let me here give you a short memorandum of association of a company limited by shares:—

#### MEMORANDUM OF ASSOCIATION OF THE NECK OR NOTHING POTTED BEEF COMPANY, LIMITED

1. The name of the Company is "The Neck or Nothing Potted Beef Company, Limited."
2. The registered office of the Company will be situate in England [*or* Scotland, *or* Ireland].
3. The objects of the Company are:—

(i.) To acquire and take over as a going concern the business now carried on at 17, Great Fish Street, Bangham, in the County of Salop, under the style of "Carl & Lamme," and all or any of the liabilities and assets of the owners of the said business.

(ii.) To carry on the said business, and generally to carry on the business of butchers, cattle dealers, merchants, and manufacturers of potted meat; and to buy, sell, manufacture, repair, alter, hire, let on hire, and deal in all kinds of cattle, machinery, implements and stock, and to carry on any other business that may seem to the Company convenient and proper to be carried on in connection with the above, or calculated directly or indirectly to promote the above objects or to enhance the value of the Company's business or of any of the Company's property for the time being.

(iii.) To acquire by purchase or otherwise any business or businesses carried on by any other person, firm or company carrying on any business which the company is authorised to carry on.

(iv.) To promote any other company or companies for the purpose of acquiring all or any of the assets or liabilities of this company, or for any other purpose which may seem directly or indirectly calculated to benefit the Company.

(v.) Generally to apply for, purchase, lease, take on lease, hire, or exchange any real or personal property [in Scotland, *movable or immovable*], and any rights or privileges which this Company may think necessary or convenient for the purposes of its business, particularly letters patent, licences for the use of letters patent, trade marks, copyrights, land, buildings, machinery and plant.

(vi) To adopt whatever means this Company may think necessary or expedient to make known to traders and to the public the products of this Company, particularly by advertisements in the press, circulars, posters, works of art or interest, and by giving rewards, prizes, and other gifts; and also to draw, make, accept, and endorse bills of exchange and promissory notes

4. The liability of members is limited.

5. The capital of the Company is £50,000 divided into 50,000 shares of £1 each, with power to divide the capital at any time or times into classes, to attach to such classes any preferential or special conditions or privileges.

We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names.

<i>Names, Addresses, and Descriptions of Subscribers.</i>						<i>Number of shares taken by each Subscriber.</i>	
1. John Jones, of 12, King Street, Challop, in the County of Middlesex, merchant	...	...	...	...	...	100	
2. Patrick Reilly, of Killahooley, in the County of Antrim, distiller	...	...	...	...	...	1	
3. William Green, of 1, High Road, Kilburn, in the County of Middlesex, grocer	...	...	...	...	...	1	
4. Alexander Gow, of 2004, Sauchiehall Street, Glasgow, in the County of Lanark, merchant	...	...	...	...	...	5	
5. Samuel Tinklet, of 7, Nix Passage, Bath, in the County of Gloucester, smith	...	...	...	...	...	1	
6. Fergus Brown, of Broomielaw, in the Shire of Clackmannan, spinner	...	...	...	...	...	2	
7. Charles Lang, of 59, Chain Pier, Brighton, in the County of Sussex, fishmonger	...	...	...	...	...	1	
						<hr/> <hr/>	
						111	

Dated the 1st day of April, 1897.

Witness to the above-named signatures,

S. J., 15, Harp St., Middlesex, Clerk.

It is most important, in framing your memorandum of association, to make it wide enough. In Chapter I. of this Book (p. 369) I have told you that a corporation can make no contracts nor do any acts which its charter does not permit. Now a limited company, being a corporation, is subject to this rule; and when I tell you that the memorandum of association is the company's charter, you will see how important it is that the memorandum should be wide enough. An instance will, I think, tell you pretty well what I mean. The Blank Star Company, Limited, was formed for the purpose of running a show and entertainment. The memorandum of association stated the object of the company to be (to put it shortly) to take over the lease of certain premises and organise and carry on a public exhibition and entertainment. The memorandum did *not* say that the company should have power to advertise its show. It was accordingly decided that the capital of the company could not be used in that magnificent kind of advertisement so necessary to the success of a great public entertainment. Let me advise you, therefore, if you have anything to do with the formation of a company of that sort or a patent medicine company, or, in fact, any kind of company



whose success depends upon bold advertisement of its wares, to take care to have a clause in the memorandum of association in which advertisement shall be set down as an object of the company. Otherwise you will only be allowed to advertise out of profits, not out of capital.

**Articles of association** must next be considered. These articles contain the rules by which the company is to be guided in the management of its internal affairs. They are not the company's "charter," or any part of its charter—in other words, your articles cannot authorise you to do what your memorandum would not. This truth is sometimes expressed thus: "The Articles of Association cannot go beyond the scope of the Memorandum." What, then, is **the use of the Articles?** Let me tell you. The memorandum is for external use. It is a kind of constitution. The articles are like bye-laws, intended for the internal government of the company. They state the powers of the directors; the time for holding the monthly, quarterly, half-yearly or yearly meetings; the number of the board of directors; how votes are to be taken at the meetings—*i.e.* whether it is to be one man one vote, or whether every shareholder shall have a vote for each share that he holds. They may also provide for putting a certain amount of the nett profits towards a reserve fund; and, in fact, lay down just such rules and regulations as might be found in a partnership agreement.

Articles of association are **not always necessary**; for by the C.A., 1862 (section 14), such articles are made optional in the case of companies limited by shares—that is, where the capital is divided into shares of a fixed amount, and the liability of members is limited to the amount unpaid on the shares he agrees to take. Suppose, for example, you buy on the market shares in Cassell and Company, Limited, you will find that these shares are £10 shares, of which £9 has been paid up. Whatever, then, happens to the business of Cassell and Company, you could not possibly be made to pay to its creditors more than the remaining £1 per share.

There is another kind of limited company; namely, the **company limited by guarantee**. This is where the capital is not divided into shares; but each member undertakes to contribute a sum not exceeding so-much should the company be wound-up. In other words, each member guarantees a fixed sum, which he is only called on to pay if and when the company comes to grief. Such companies as these must have articles of association in addition to a memorandum.

Now, although companies limited by shares are by far the most usual—in fact, any other kind of company is of the rarest—and although such companies are not obliged to have articles, yet there is hardly a company registered in the course of a twelvemonth without such articles. I do not know why. The C.A., 1862, has at the end of it a number of regulations, called "Table A," for the government of companies limited by shares; and very probably these would be found sufficient for many small companies. The regulations in Table A always apply to a company limited by shares unless you have some articles of association expressly excluding them. Table A is too long to set out here in detail. Some of its provisions are—

That any member shall be entitled to a certificate from the company specifying



the share or shares held by him, and how much is paid up thereon, on paying to the company one shilling.

If the certificate be lost or worn out, the member may have a new one for another shilling.

"Calls" may be made by the directors; but twenty-one days' notice shall be given.

The company can decline to register a transfer of shares made by a member who owes money to the company.

The directors may forfeit the shares of a member who does not pay his calls; but they must first give him notice that they intend to do so. Moreover—and this is important—although the shares are forfeited, the member is liable to pay the calls made up to the date of forfeiture.

There are other regulations about the holding of meetings—how much notice is to be given, and how members are to vote.

Further, one-fifth of the members may, if they desire it, request the directors to summon an extraordinary general meeting. They do this by a written notice, signed by them, which notice must be left at the company's registered offices. The notice must state the object of the meeting. Thus, it will not be enough to say, "We, the undersigned, require an extraordinary general meeting of the company to be called." They must go on to state, "to consider the question of a certain contract entered into (or about to be entered into) by the directors with So-and-so for the erection of a new factory, and to decide whether or no such contract shall be proceeded with"—or whatever the business may happen to be.

I should add that the Companies Act, 1862, with Table A printed at length, may be obtained for 2s. 10½d. from the Queen's printers, Messrs. Eyre & Spottiswoode, East Harding Street, Fleet Street, London, E.C.

**Registration.**—When the memorandum and articles of association are prepared, the next thing is to register the company. Now, every company is bound by the C.A., 1862 (section 39), to have a registered office; and where the office is, there will be the headquarters of the company. And the company is said to carry on its business in that part of the United Kingdom where that office is situate. Thus, suppose someone starts a Boot and Shoe Supply Company, with one shop in Glasgow and ten in Birmingham, if the registered office is in Glasgow, the company is said to carry on its business there. Consequently, the company must be registered in the office of the Joint Stock Registrar for Scotland. An Irish company must be registered in the Dublin Joint Stock Registry; and an English company in the London Joint Stock Registry, at Somerset House.

Let me impress upon you the fact that a limited company is not a company at all—it has no ghost of legal standing—until it has been registered.

How is registration accomplished? Well, simply by taking or sending the memorandum and articles of association to the Registrar of Companies in London, Edinburgh, or Dublin, as the case may be. And you must at the same time send to him a statement of the nominal capital of the company.

The registrar keeps these documents and files them in his office, where

they can be seen by anyone who chooses to look at them, on payment of one shilling.

Then the registrar sends to the company's secretary a certificate of incorporation of the company, which certificate is conclusive proof to everybody that the company has been properly incorporated. Even if, in fact, something has been done which ought not to have been done, or something has not been done which ought to have been done, the certificate rectifies the mistake; and no one can be heard to say that the company was not properly formed.

**Stamp duty and fees.**—In a rush of company-floating, the public reaps some benefit, even out of the emptiest of bubbles. For thousands of pounds are annually paid into the public treasury by way of stamp duty and fees on the registration of new companies.

To begin with, the memorandum of association must bear a 10s. stamp; and the articles of association are subject to a similar duty. Then you must pay, when you send your memorandum and articles to be registered, certain fees to the registrar. These are:—

	£	s.	d.
When the nominal capital is £2,000 or less ...	2	0	0
When the capital exceeds £2,000:—			
(a) The same fee of £2			
(b) For every additional £1,000 after the first £2,000 up to £5,000 ...	1	0	0
(c) After £5,000, for every £1,000 up to £100,000 ...		5	0
(d) After £100,000, for every additional £1,000 ...	1	0	

Provided that in no case shall a company have to pay more than £50.

By the Stamp Act, 1888 (section 11), a very great additional burden was placed upon new companies; for every company is now bound to pay a duty of 2s. in the £100 on its capital. This duty is paid when you send in the statement (referred to on the preceding page) of the nominal capital of the company. The enactment was intended, partly, to check the formation of bogus companies, or companies with inflated capital. As far as I know, its effect in that direction has been infinitesimal; but 'tis an ill wind that blows nobody any good, and the Chancellor of the Exchequer has benefited, if nobody else has. For instance, I see advertised in to-day's newspaper four new companies with capitals amounting in the aggregate to one million and five thousand pounds (£1,005,000). The duty paid by these companies is £1,005.

The above rules apply to companies limited by shares; other companies are so few and far between that they are hardly worth writing about.

## II. (a) POINTS FOR INTENDING INVESTORS.

So much for the formalities incident to the formation of a company; now let us look at the question of taking shares. Most people know, I suppose, that the usual course is for the promoters or first directors of a new company



to issue what is called a prospectus, setting forth the objects of the company, its prospects of success, and so forth. This prospectus is extensively advertised, both in the newspaper press and by circular. I myself receive some dozens of prospectuses nearly every week, and, as a rule, consign them speedily to the waste-paper basket. Before I deal with prospectuses at length, I wish to warn my readers against

#### AN INGENIOUS SWINDLE.

Let me premise this by saying that the directors of a company whose names appear by their authority on a prospectus are liable to compensate persons who have been misled thereby. So also are all promoters who have taken part in preparing the prospectus, and all other persons who have actually authorised the issue of the prospectus (Directors' Liability Act, 1890, section 3). The statute referred to is somewhat of a stumbling-block in the way of promoters of bubble companies, and so these ingenious gentlemen have hit upon a sweet little swindle with intent to evade the statute.

Suppose, for example, a man has a tin-mine in Mexico—value nothing—which he wants to palm off on the public. He engages the services of a gentleman who calls himself an outside broker—*alias* a “bucket-shop” keeper, as they say in the City. The precious pair then take unto themselves five others, no better than themselves; perhaps they even get hold of an innocent retired half-pay colonel or an impecunious person with “Honourable” in front of his name. There always seem to be plenty of people with handles to their names willing to become directors of limited companies—for a consideration. The mystic seven being gathered together, the tin-miner and the bucket-shopman make a contract in this sort of way: The tin-miner agrees to sell to A. Clerk (someone in the bucket-shopman's pay, probably) the whole of the tin mine situate in the district of Quackiboo, Mexico, and known as the Quackiboo Tin Mine. Mr. A. Clerk purchases as trustee for a company now in course of formation, to be called “The Quackiboo Tin Mine Company, Limited”; and the price is to be £100,000 in shares of the company.

Then the memorandum and articles of association of the company are drawn up. The objects of the company are stated to be to take over the agreement entered into by A. Clerk, and to work the tin mine. The capital is probably fixed at £200,000, divided into 200,000 shares of £1 each. The first directors are the half-pay colonel, the impecunious Honourable, and one or two persons who are sarcastically described as “Esquire.” The company is duly registered, and as soon as the registrar has given his certificate, the directors proceed to allot shares. A few are allotted to themselves, and for these the two arch-promoters pay. As a matter of law, everyone who signs the memorandum of association must take at least one share. Then 100,000 shares are allotted to the tin-miner as per agreement. So far, it has been all work and no pay for the tin-miner and the keeper of the bucket-shop, whose plan now is to unload the 100,000 shares upon the market. The first thing they do is to obtain what is called a “quotation” on the Stock Exchange, the effect of which is to cause the shares of the Quackiboo Tin Mine Company, Limited, to appear in the list of shares that are dealt in on the Exchange. Suppose the shares are originally quoted



at £1 each, this means that £1 is the market price of the shares on the Exchange. It is easy, after this, to send the prices up by creating a fictitious demand for the shares; so that, with a little luck, the quotation begins to move up, first (say) to 21s., and gradually up to (say) 30s.

The next stage of the conspiracy shows the wise foresight of the tin-miner in enlisting the co-operation of the bucket-shopman. For the latter causes to be printed an enormous number of circulars, which he despatches to all sorts and conditions of men and women. These precious documents run in manner following:—

Torrid Mansions, E.C.

April 1, 1897.

SIR (OR MADAM),—I beg to call your attention to the favourable opportunities now presenting themselves for making money on the Stock Exchange. In the railway market I would recommend Manchester & Sheffield Ordinary Stock, which now stands at 53. Allsopps Preferred are also a good investment at present prices. They are sure to rise from four to six points in the course of a few weeks. There is also a great deal to be done in the Quackiboo Tin Mine shares, which have in the course of the last fortnight jumped from 20s. to 30s.; and I confidently anticipate that they will rise very much higher before long. These shares form a very good investment, as they are expected to pay at least 12 per cent. I shall be glad to transact any business you may favour me with.—Your obedient servant,

A. BUKITT SCHOPER.

A letter like this is sure to find its victims amongst the speculative clergy and credulous widows of small means. And experience has shown that it appeals very strongly to the large class of people who, having saved fifty or a hundred pounds, are anxious to invest that sum in the most remunerative manner. A man of the world would at once ask why Mr. Bukitt Schoper did not keep his good thing to himself and so put a large fortune into his own pocket. He knows that the man who has discovered a gold mine does not send round circulars to tell other people where to find it. But the classes at whom the circular is aimed send their money to Mr. Bukitt Schoper and ask him to be so kind as to buy Quackiboo shares on their behalf. The which he does with alacrity; buying the shares at 30s. apiece from his friend the original tin-miner. In this way I have known as much at £120,000 divided between the two scoundrels who conceived the scheme.

My advice to you is, never to buy shares in a limited company without seeing the prospectus. You are entitled to inspect the Register of Joint Stock Companies at Somerset House, London (or at Edinburgh, or Dublin, as the case may be), where you will find the registered address of the company. Write to the secretary for a prospectus; and if you find that none has been issued, be suspicious at once.

"Why?" you ask. Well, because by the Directors' Liability Act above-mentioned, directors and promoters are liable for false statements in a prospectus; and very frequently no prospectus is issued, in order to elude the Act. The shares are got rid of through some outside broker in the way I have described; and when the buyer finds he has been swindled he will have no remedy in ninety-nine cases out of a hundred. He will have no remedy under the Act because no prospectus has been issued. His only remedy by the Common

Law would be for deceit, against Mr. Bukitt Schoper. But that gentleman knows full well that you can only bring an action of deceit when some false statement of *fact* has been made to you; and if you look carefully at his letter you will see that it contains no false statement of fact. In the first place, it is quite true that Quackiboo shares have jumped from 20s. to 30s. in a fortnight. Then, "I confidently anticipate that they will rise very much higher before long." This is not a statement of fact, but of opinion. So also are the two remaining assertions as to (1) the shares forming a good investment and (2) the expectation of a large dividend. Indeed, the letter was concocted expressly for the purpose of deceiving the public, but in such a way as to save the skin of the writer from the lash of the law.

If you happen to be a victim of one of these schemes of plunder, you have only one remedy—which is, to have the company wound-up by the Court, so that full investigation can be made. Then you stand some small chance of compelling the directors and promoters to disgorge. For the purpose of obtaining such a winding-up and investigation, you should go to the office of the company and ask to see the register of shareholders. Write to them and try to raise a fund in order to fight the case. And be sure you employ some sharp-witted solicitor to act for you—otherwise Mr. Bukitt Schoper will out-manœuvre you; for he can afford to pay for the best expert assistance that is to be had for money, and he and his advisers know every move on the board.

**Applying for shares.**—An application to take shares in a company is only an offer of a contract, which is accepted when the directors allot the shares to you. Therefore it is always open to you to withdraw your application at any time before such allotment, because an offer can always be withdrawn before it has been accepted (p. 260). So that if, after you have applied, you discover something to the company's disadvantage, your best plan is to write or telegraph at once, saying, "I cancel my application for shares in the X Y Z Company."

You generally see in the printed form of application sent with the prospectus, the following words: "And I hereby agree to accept such shares" (*i.e.* the number you apply for) "or any less number allotted to me by the directors." The reason is plain. As I have stated elsewhere (p. 246) if you make an offer of a contract, it can only be accepted in the terms of the offer. Therefore, if you apply for ten shares, and the directors allot you five only, this is no acceptance of your offer; but only a counter-offer on their part to allot five: which offer you can accept or not as you think proper. But the clause above quoted, being part of your offer, entitles the directors to allot you any number of shares not exceeding ten.

Most companies advertise a particular date upon which the board will proceed to allotment. If this date is not kept, your application falls through. But occasionally you find no date fixed. In such a case your offer to take shares remains open for a reasonable time (unless you withdraw it), and not for any length of time that the directors may choose. For instance, Mr. Montefiore applied for shares in the Ramsgate Hotel Company, and for three months heard nothing more about it. At the end of that time, however, he received a letter stating that so many shares had been allotted to him. But



by this time Mr. Montefiore no longer wished to become a shareholder ; so he refused to take the proffered shares. And the Court held that he was quite right. His application had fallen through by mere lapse of time.

**Difference between allotted shares and bought shares.**—There is a very great deal of difference between the position of the man who applies for shares to be allotted to him and that of the man who buys the shares. Take this case : Jones receives the prospectus of a new company. The scheme of the undertaking pleases him and he fills up the usual form of application, forwards it to the proper quarter and in due course has allotted to him by the directors 100 £1 shares. He is an original shareholder, in fact.

Now, Jones's position is this: If any of the statements in the prospectus are false, he has the benefit of the Directors' Liability Act ; and if he suffers loss, can come upon the directors and promoters to pay him compensation. This right is, of course, subject to the reservation that if the directors and promoters acted in good faith, and only made the statements on the basis of competent expert reports, Jones has no remedy ; because the directors are not then to blame. Jones can also, on discovering the misrepresentation, demand to have his money back and his name removed from the register of shareholders.

But take the case of the man who buys shares. Thus, Jones receives the prospectus, but does not immediately apply for shares. When he does apply it is too late, for they have all been allotted. Wherefore Jones instructs a stockbroker to buy some for him. Smith has 100 shares to sell. These Jones's broker buys ; and Jones takes the place of Smith on the register of the company. In course of time it turns out that the company was a fraud ; the prospectus was a tissue of lies ; and Jones begins to ask himself how he is to get out of it. By this time the company stinks in the nostrils of the public and its shares are unsaleable. Jones receives a letter informing him that the directors have made a "call" of 5s. per share ; and the worthy Jones turns up his *Family Lawyer* to see what his position is.

Well, I regret to say it is not an enviable one. He can only bring an action against the directors and promoters on account of the fraudulent prospectus if he can prove that the prospectus was sent with intent to induce him to buy shares. How so ? Because it is held that the only persons who can as a rule complain of the prospectus are the original shareholders—that is, those to whom shares were allotted by the company—not those who bought from allottees. This is because the statements in the prospectus are held primarily to be directed to the persons who apply for shares directly to the company. But if the prospectus is sent by a director or promoter to Jones after the company is floated and the shares have been allotted, Jones may persuade a jury to believe that it was sent for the purpose of inducing him to buy on the open market. In the case given Jones will hardly succeed, because the prospectus was evidently intended to induce him to apply for an allotment, it having been sent to him before the company had proceeded to allotment.

An allottee who has been led into taking shares by misrepresentation or concealment of a material fact in the prospectus ought to claim to have his



contract rescinded and his name removed from the register with the utmost promptitude. Any unreasonable delay will cause him to lose his right.

He is entitled to the time necessary to investigate the facts; but no longer. **The steps to be taken** are (1) To write to the secretary at the registered office of the company as soon as the true facts are discovered giving notice of repudiation. Such a letter as the following will answer the purpose:—

1, High Street, London.

December 1, 1897.

SIR,—With reference to my holding of twenty Ordinary Shares in the Timbuctoo Colliery Company, Limited, I beg to give you notice that I was induced to apply for the shares by the representation in the prospectus that the profits of the Colliery for the year 1896 amounted to £8,000. I now discover this to be untrue; and I therefore repudiate my contract; and demand the return of my application money and the removal of my name from the register of shareholders.—Your obedient servant,

A. SMITH.

(2) If the request be not speedily complied with, instruct your solicitor to take proceedings immediately. The important word is *immediately*; for in one case where the directors refused to comply with such a notice and the shareholder waited a month before taking proceedings, it was held that he had lost his right to throw up the shares; though such a delay would not affect his claim for damages against the directors and promoters personally.

**Section 38—An important point.**—If you look at the next prospectus that you see advertised, you will in all probability come across a paragraph of this kind: "The vendor [or the promoters, or the company] has also entered into certain contracts relating to the expenses of the formation of the company, and in connection with guaranteeing and issuing the capital [etc. etc. etc.], and applicants for shares will be deemed to have notice of such contracts and to have waived their rights to have such particulars thereof, as is prescribed by section 38 of the Companies Act, 1867." I have frequently been asked what this means; and why intending applicants should be asked to waive their rights under section 38 of the C. A., 1867.

That section is one of the bugbears of company-promoters—honest and otherwise. For it enacts that every prospectus and every notice inviting subscription for shares in a company shall specify "the dates and names of the parties to *any contract entered into by the company or the promoters, directors or trustees thereof*, before the issue of the prospectus or notice," whether provisional or otherwise. If the required particulars are not given, "the prospectus or notice shall be deemed fraudulent on the part of the directors, promoters and officers of the company knowingly issuing the same, as regards any person taking shares in the company on the faith of such prospectus *unless he shall have notice of such contract.*" This section is very sweeping—so sweeping, in fact, that it can very rarely be complied with; because in many cases the directors and promoters and the company itself have entered into a number of small contracts relating to the company; such as hiring an office, engaging clerks or servants, and other necessary things. Therefore the clause alluded to above is almost invariably inserted in the prospectus or else in the form of application. In fact, the statute

here overreaches itself by too much stringency ; because people who see the waiver clause are told that it is "usual," or even necessary in the most *bond fide* prospectus ; and they therefore fail, sometimes, to make inquiries where such inquiries would be most useful.

**Another point.**—If I were about to invest money in a new company, I should look in the prospectus to see, not only the amount to be paid by the company to the vendor, but also to see how much the vendor paid for the property himself. For this is what very frequently happens : Jones has a cycle business, upon which business Brown, a company promoter, has his eye. He goes to Jones and gives him £100 for the option of purchasing the business at any time within six months for £10,000. Then the Hickory Dick Company, Limited, is formed, to take over the business for £50,000. Jones sells to Brown for £10,000 ; and Brown sells to the company for £50,000—a handsome profit, even after deducting a large sum for expenses of floating the company. The prospectus issued to the public will almost certainly give the date, etc., of Brown's contract with the company, but will say nothing about Brown's contract with Jones. Now, this is the very contract intended to be hit by section 38 ; for the Legislature meant every shareholder to be acquainted with the process of flotation or promotion. Yet, because the section includes all contracts, however trivial, the contract to which I have drawn your attention will probably never be disclosed at all. It may be that the business is worth £50,000 and that the company have made a good bargain ; but I venture to think that if you knew that Brown was buying for £10,000 and reselling immediately for five times that sum, you would think twice before investing your money in the concern. Still, it is done every day.

The best course is to write to the office of the company, or call there to inquire how long the vendor has been the proprietor of the business sold to the company ; and if you find out that he has not been the owner, further inquire how much he paid or is going to pay. If this information be not readily given, fight shy of the concern. If an untrue statement is made, you have your remedy in an action of fraud against whoever makes it.

I may say here that section 38 includes not only contracts made by the promoters and directors which bind the company ; but also all others relating to the company's affairs. For example, Jones forms a company ; and, with a view of giving the prospectus a respectable appearance, he persuades Major-General Bangs, C.B. (retired), to allow his name to appear as a director. For this obligation the Major-General is to receive £100 from Jones if the company floats. This agreement ought to appear on the prospectus—unless there is a waiver clause : so also ought an agreement by the promoters to give the directors their qualifying shares ; an agreement by the promoters to pay a salary to the trustees for the company ; an agreement by the directors to appoint A B managing director on certain terms. In fact (unless there is a waiver clause in the prospectus or the application form), "every contract ought to be disclosed the knowledge of which might have an effect upon a reasonable subscriber for shares in determining him to give or withhold faith in the promoter, director or trustee issuing the prospectus." For as Cockburn, Chief Justice, said, the section "was intended to protect the shareholder against deceptions too often practised in the creation of



companies by insuring him full information as to all material circumstances attending the formation of the company he is invited to join, antecedently to the issuing of the prospectus."

If you have been induced to take shares by reason of a prospectus, and such prospectus fails to disclose such contracts as are alluded to in this subsection (and contains no waiver clause), you cannot claim to have your name removed from the list of shareholders. In other words, the fact that section 38 of the C. A., 1867, has been broken only makes the directors and promoters personally liable to the defrauded shareholder. The latter remains saddled with his shares and must pay all calls that are made, trusting to his remedy against those persons who issued the prospectus (*see* section iv. of this chapter).

**A warning.**—Of the hundreds of limited companies whose shares are offered for public subscription, not more than 5 per cent. receive a sufficient number of subscriptions to enable them to carry on business properly. For example: Smith and Jones promote a company to work a gold-mine; nominal capital £50,000 in £1 shares. The price of the mine is to be £15,000; payable as to £5,000 in cash and £10,000 in fully paid-up shares. As soon as the company is formed, the 10,000 shares are allotted to the vendor; and the other 40,000 are offered for subscription. Obviously, unless at least 5,000 are subscribed, there will not be enough to pay for the mine. And, equally obviously, unless considerably more than 5,000 are subscribed the company will find itself possessed of a mine, but without any working capital.

It has been suggested by many company experts—lawyers and City men—that no company should be allowed to proceed to allotment unless a definite proportion of its shares are applied for—enough, that is, to provide working capital. The reason for the suggestion is that under the law as it now stands such a company as I have described in the last paragraph may operate as a horrible fraud. Thus, suppose 500 people apply for 10 shares each in the aforesaid company. The directors can allot 10 shares to each of them, and make calls upon them for the full nominal value, pay the lot to the vendor, or otherwise spend it, leaving the company without a penny. This kind of swindle is frequently practised of malice aforethought.

How is it to be detected, and how avoided by the intending investor? Let me indicate a way. Some prospectuses contain this clause: "The Board will not proceed to allotment unless at least 30,000 shares are applied for in addition to those agreed to be allotted to the vendor." When I see a prospectus worded in that sort of way I am more apt to believe in its honesty than if I see the names of half a dozen noble lords and as many members of the Lower House of Parliament figuring at the head as directors. Far be it from me to say that no prospectus or no company is honest and sound if such a clause be absent. I know it to be otherwise. There are scores of honest companies floated without any such undertaking being given.

If that is so, and the absence of such a clause is not an infallible test, how are you to protect yourself? Well, by simply making it a condition of your application that you decline to take shares unless a certain number are applied

for by and allotted to responsible persons. The following (slightly altered) is a form of application appended to a company prospectus :—

To the Directors of THE LONGJOR COMPANY, Limited.

GENTLEMEN,—Having paid to your Bankers, the Catchington Bank, Limited, the sum of £10, being 5s. per Share on 40 Shares in The Longjor Company, Limited—hereinafter called the Company—I hereby request that you will cause to be allotted to me by the Company that number of Shares in the Company upon the terms of the Prospectus and Memorandum and Articles of Association of the said Company, and I hereby agree with the Company to accept such Shares or any less number the Company may allot me, and to pay to the person entitled to receive the same balance thereon, according to the terms of the Prospectus, and I request the Directors of the Company to place my name on the Register of Members for the Shares so allotted to me.

Name (in full).....  
Address.....  
Occupation .....  
Date . ....  
Usual signature .....

This form should be filled up and forwarded, with a cheque for the amount of the application money, to the Company's Bankers, the Catchington Bank, Limited, London, E.C., or Branches.

Write in the margin these words, "This application is conditional upon and subject to 2,000 [*or any other number you think proper*] shares being applied for by and allotted to responsible persons" ; and add your signature and the date. This condition will protect you from being saddled with shares that cannot possibly be worth anything to you.

II. (b) LIABILITY OF SHAREHOLDERS.

Registration is always necessary before you can become a member of a limited company. Every such company is bound to keep a register of members (p. 636) ; and your rights and liability as a shareholder begin when you are registered. It sometimes happens that difficulties and disputes arise on the question of registration. These are divisible under two heads—namely, (1) When the directors wrongfully put you on the register, and (2) When they wrongfully keep you off. The first kind of case occurs usually when you have been induced to apply for shares by misrepresentation. The misrepresentation may be contained in the prospectus, or may be made to you individually by a promoter, director, or officer of the company. But in any case when you have been induced by misrepresentation to take shares, and your name is on the register of members, you have the right to have your name struck off. If the directors decline to do this, take prompt action in the Court, as noted on p. 616. Do not wait until an action is brought against you for calls, but assume the position of the attacking party. If you wait until somebody presents a petition to wind-up the company, you will be too late.

Another case where it happens that you are wrongfully on the register of members is when you have applied for shares and the directors have allotted them to you, but no notice of the allotment has been given to you. For it



is essential, in order to make a binding contract to take shares that there should be (a) a letter of application, (b) an allotment of the shares by the board of directors, and (c) some communication or notice to you of the fact of allotment. This communication or notice need not be formal, nor even in writing. But the company must let you know somehow that your offer to take shares has been accepted. If, therefore, you receive no notice of the kind, and afterwards discover that your name is on the register of members, you may apply to have it struck off.

The second class of cases is of quite a different character—where you claim to be put on the register and the board of directors refuses to register you. In many companies, especially where the promoters wish to keep the shares in a limited number of hands, one of the articles of association often is that the directors may refuse to register any transfer of shares unless their consent to the transfer has been obtained. The following is an illustration of what I mean :—

For half a century or more a great steel and iron foundry was carried on in the north of England by a family whom we will call Parker. About ten years ago the firm consisted of three cousins, who, for purposes of convenience, decided to convert their business into a limited company. They accordingly took in four other members of the family to form the necessary seven; and formed Parker, Limited, instead of Parker and Parker. But although they formed themselves into a company, the cousins had no intention of admitting any outsiders into the concern. So they made it one of their articles that the company should not be obliged to register any transfer of shares unless these shares had been transferred with the consent of the directors. This was with the notion of keeping out anybody who was not a member of the Parker family. All went well until one of the cousins, who owned about 50,000 shares, died. He left his property in trust, and did not give his trustees power to hold his shares in Parker, Limited. Consequently the trustees were obliged to sell. They sold all the shares in a lump to a wealthy man whom we will call Jones, a gentleman who was not a member of the family and seems not to have been acceptable to the directors. These gentlemen refused to consent to the transfer. They had nothing in particular to urge against Mr. Jones. He was undoubtedly solvent. But he was not a Parker, nor a Parker relative nor connection. Seeing that the Board would not consent to the transfer, the deceased Parker's trustees sold and transferred the shares without such consent; and then Jones applied to have the transfer registered in the company's list of shareholders. The Board refused to comply; wherefore Jones brought an action to compel them to register him as the holder of the shares in the place of the deceased. The Court decided that the directors were wrong in the line they had taken. Though they had the power to refuse to consent to a transfer, they must not exercise their power capriciously. They must be able to show some good reason for their refusal. Had the Court supported the action of the Board, think how serious would have been the consequences to the deceased shareholder's estate. For if the directors could lawfully say, "We refuse to allow the sale of the shares to anyone but a member of the family," it would have come to this: the trustees (being

compelled by law to sell) would have been obliged to sell the shares to one of the Parker family. Practically, the members of that family could have fixed their own price for the shares; and had they chosen to combine, and offer half a crown apiece for shares worth fifty times that amount, the trustees must have sold at that ruinous sacrifice.

The clause empowering the directors to refuse to register a transfer of shares is also inserted in the articles of some companies for the purpose of protecting the company against pauper shareholders who are unable to pay the calls. Thus, Smith applies for and obtains 100 £1 shares, paying two-and-sixpence per share on application and a further half-crown on allotment. No more capital is called up for a little while, and the company carries on a lucrative business for a year or two. Then come reverses, and Smith, foreseeing that a call of 10s. a share is likely to be made, and that even then the company will probably end in liquidation, transfers his 100 shares to Styles, a poor relation without a farthing in the world. Unless the articles contain the clause indicated at the head of this paragraph, the company is bound to register the transfer, and to accept Styles the pauper as a shareholder in place of Smith the wealthy merchant. If the company is eventually wound-up, it is just on the cards that Smith may still be made liable to the creditors (p. 627). But if there is such a clause, the directors may refuse to receive Styles, and Smith will be liable to pay calls up to the nominal value of his shares so long as he is on the register.

Some companies also have an article by which no member is allowed to transfer shares until they have been fully paid-up. It is as well to ask if such a regulation exists before you make arrangements to buy partly paid-up shares. The object of the bye-law is to prevent transfers to paupers so as to avoid liability. Of course, after shares in a limited liability company are paid-up, it matters very little whether the registered owner is a pauper or a millionaire; for it is the very essence of these companies that once the nominal amount of the shares has been paid-up, no liability attaches to the holder. But before the shares have been paid-up, the solvency of the registered owner is a matter of the greatest importance.

**For the persons whose names appear on the register of shareholders are the persons who are liable** to the company to pay calls on the shares, and who are entitled to dividends and other benefits. From the point of view of getting rid of further liability, then, it is most important, when you transfer shares, to see that the name of the transferee is registered in place of your own. From a point of view of acquiring benefit, on the other hand, it is just as important, when you buy shares, to insist upon a transfer to yourself, and the registration of your name in the company's book as soon as possible.

**Shares issued as fully paid-up.**—I daresay you have often seen in the prospectus of a company such a clause as this: "The price of the property to be acquired is £50,000, of which the vendor has agreed to take £10,000 in cash and £40,000 in fully paid-up shares." It is always competent for a company to issue shares as fully paid-up, in consideration of property sold or services rendered to the company. But there are some restrictions imposed by section 25 of the C.A., 1867, which enacts that there must be a written



contract for the issue of such shares; and this contract must be filed with the registrar of Joint Stock Companies in London, Edinburgh, or Dublin, "at or before the issue of such shares." The contract must be sealed with the company's seal and signed by the allottees before it is filed. This section makes it impossible to allot shares and then to write them off as fully paid-up.

Unless there is such a contract as specified in the last paragraph, every allottee is bound to pay for shares in cash. He is, moreover, liable to pay the full nominal value. It has been decided to be **illegal to issue shares at a discount**. I will show you what I mean. A gold-mining company made an agreement to issue to A B 100 £5 shares at the price of £2 10s. each. That is, when A B had paid £2 10s. to the company, his shares were to be considered fully paid-up. The Court held this agreement to be illegal, although the contract was duly filed at Somerset House; and A B had to pay the remaining £2 10s. per share.

You ought to be very careful about accepting shares issued as fully paid-up. In the first place, the company cannot issue such shares to you except in consideration of money's worth (*i.e.* property or services) rendered to the company. For example:—Smith had a boot and shoe shop, which was in rather a bad way. Debts had accumulated, amongst the rest a sum of £50 to Jones. Then Smith formed a company of himself, his wife, and a few friends, to purchase his business. Smith received most of the consideration for the sale in fully paid-up shares. A few other shares were sold to the public, but not many. When Jones, who knew nothing of the scheme, called to collect his £50, Smith offered to give him 100 £1 shares in the company. Jones accepted the offer; and Smith, who was practically the whole board of directors, allotted the 100 shares to Jones as fully paid-up. In course of time the company was wound-up by the Court, and Jones was cross-examined as to how he became possessed of his shares. He artlessly told the tale, and was much surprised when he found himself called upon to pay £100 to the liquidator as the price of his shares. The reason was that (1) no contract had been made and filed, under section 25 of the C.A., 1867; and even if there had been, (2) the bargain was void, because there was no consideration for it. Jones had done nothing for the company. He merely released Smith from a private debt; and Smith, as director, had used the company's assets to pay that debt. It was rough on Jones in this particular case, for he had acted in good faith; but the rule is salutary enough and must be obeyed. Had Jones taken 100 of the shares originally allotted to Smith as the price of the business, he would have been all right, for that would have been a payment of the debt by Smith with his own shares.

The last paragraph relates to your position if you accept an allotment of fully paid-up shares, against the C.A., 1867. There is also some danger in taking a transfer of shares which have been allotted as fully paid-up, in defiance of the Act. Take the case given in the last paragraph. Suppose Brown had bought the 100 shares wrongfully allotted to Jones. He would be liable to pay £100 to the company, if he knew the circumstances in which Jones acquired them. If he did not know, *and* had purchased them for valuable consideration (p. 276) from Jones, he would not be liable.

**Transfers to escape liability.**—I have already said that unless the articles

of the company allow the directors to refuse to accept a transfer of shares, there is nothing to prevent you from making a transfer of shares in a rickety company in order to escape liability—even if you do it with that avowed object. But the transfer must be an actual one. The transferee must take the shares for better or worse. If you transfer your shares to a pauper on the understanding that he is merely to hold them until the storm blows over, and to hand them back to you if the company becomes prosperous, you will be held liable just as though there had been no transfer at all. Otherwise you would be playing with the company on the "Heads I win, tails you lose" principle.

This has been decided in *De Pass's* case, and others. A shareholder in a shaky company "sold" to his clerk for next to nothing a number of shares—admittedly for the purpose of escaping liability. But, as the transfer was out and out, and the clerk had not bargained to give the shares back if the company weathered the storm, or anything of that sort, the transaction was held valid; and as the company was wound-up more than a year after the transfer the master escaped becoming a contributory by the skin of his teeth, as sailors say. *Battie's* case was another of much the same kind. Here the transferee was an impecunious party who gave the company a false address for registration; but even here the transfer was upheld, because there was no trust in favour of the transferrer, and no benefit reserved for him.

Now let us turn the tapestry, and see when the transfer has been held invalid and useless. *Chinnock* had 500 shares in a rickety company; and these he purported to transfer to his clerk for £500, which was never paid. Before going to the bad altogether the company paid a dividend. That on the 500 shares aforesaid was sent to the clerk, who promptly handed over the cheque to his master, and the latter kept it for himself. When the company was afterwards wound-up, the liquidator put the master down as a contributory in respect of the 500 shares, instead of the clerk. And the liquidator was adjudged to be right, because it was clear from the facts that the so-called transfer was a sham one. The shares were not transferred to the clerk out-and-out, but merely nominally—on the understanding that all benefits were to belong to his master.

Further, if a transfer is made for some fraudulent purpose, it will not be sufficient, in the event of a winding-up, to exonerate the transferrer from liability. These are one or two cases of this sort:—*X Y*, a shareholder in a company, thinks there is something wrong and presents a winding-up petition to the Court. To stifle inquiry and investigation, the directors buy off *X Y*, paying him a sum of money and persuading him to transfer his shares to a nominee of their own. Two years afterwards the company is wound-up. The transfer aforesaid will be held to be bogus, and *X Y* will be put down as a contributory in respect of those shares.

*When the approval of the directors is obtained by misrepresentation.*—When by the articles of the company the consent of the directors has to be obtained to a transfer of shares, the transfer is void and of none effect if such consent is obtained by a misrepresentation. The principle of this is obvious. It rests on the general rule of law that no man shall be able to take advantage of his



own fraud and falsehood. One Payne held 68 shares in a leaky company, which stopped payment on the 11th of May, 1869. But on the 10th, Payne had transferred his shares to one Blank, who was described in the transfer deed as "of 10, China Walk, Lambeth Road, gentleman." No transfer was valid without the directors' consent, and this consent was given and the shares were registered in Blank's name. The deed of transfer also stated that the transfer was in consideration of £17 paid by Blank to Payne. In fact, these statements were untrue. Blank had not paid £17; he had actually received £5 from Payne to take the shares; and instead of being a gentleman he was a messenger on 25s. a week. The Court held the transfer void, because the directors' consent had been obtained by wilful misrepresentation.

And generally any misdescription of the transferee will be enough to cause the transfer to be set aside, if the Court comes to the conclusion that it was made with intent to deceive the directors and to gain their consent upon false pretences. Such, for instance, was the case when a transfer described the transferees as "gardener" and "sheep-farmer," when one was a gardener's labourer at 15s. and the other a shepherd at 18s. a week.

Lord Westbury, in a series of cases arising out of the European Arbitration, went further than this. He said that when the consent of the board is requisite to a transfer of shares, the transferrer cannot escape liability unless, when he sent in the names for approval, he believed them to be the names of men of substance, able to meet their liabilities. This, of course, can only be applied when it is obvious that shares have been transferred on purpose to evade liability as a contributory.

*Summary of rules as to transfer to escape liability:—*

(1) Such a transfer is valid if it is an out-and-out transfer, without any reservation or benefit for the transferrer and without fraud.

(2) Such a transfer is not valid if the transferee is merely to hold the shares to see if the storm blows over, and to hand over all (or any) benefit to the transferrer.

(3) Such a transfer is not valid if it is done to accomplish some fraudulent object—*e.g.* to stifle inquiry.

(4) Such a transfer is not valid if it requires the consent or approval of the directors, and such consent or approval is gained by wilful misrepresentation, or by putting up a man whom you do not believe able to pay. (Refer to pp. 271-2.)

**Calls.**—As a rule, when you apply for shares, you are required to send to the company, or the company's bankers, a certain proportion of the nominal value of the shares you apply for. Usually the proportion is about one-fourth. Thus, when you apply for £1 shares, you are generally asked to forward to the company's bankers the sum of 5s. per share. It is commonly stipulated in the prospectus that the further sum of 5s. per share shall be paid immediately on notice of allotment being given. So that if you apply for twenty £1 shares you must pay £5 down when you apply and £5 as soon as the directors notify you that the twenty shares have been allotted to you. This leaves 10s. per share still due to the company.

Possibly you may never be called upon to pay any more, for the amount already called up may be enough to work the company's business successfully. I hold shares of the nominal value of £10 each in a certain company, but only £9 of this has been called up, though the company has been formed many years and pays about 8 per cent. Now suppose the directors happened to want more money, they could call on all the shareholders to pay £1 per share. How must this "call" be made? Well, in the first place, it must be done according to the articles of association of each particular company; or, if the articles are silent on the point, according to article 4 of Table A (p. 610). This article provides that calls may be made by the directors upon the members, provided that twenty-one days' notice at least is given of each call; and the notice of call is to state the time and place at which the call is payable.

**Rules as to calls.—Forfeiture.**—It is a common thing for a company's articles to provide that a member who does not pay a call within (say) a month of the notice shall forfeit his shares to the company. This is a point upon which shareholders should keep their eyes open. When shares are forfeited in this way you lose all that you have paid on them, and the directors can reissue them as though they were new shares. Remember, though, that you can always save the shares by paying up before your name has been struck off the register of members.

**Interest on unpaid calls.**—By article 4 of Table A a member who does not pay his calls at the proper time is liable to pay 5 per cent. interest from the date when he ought to have paid. This may, of course, be varied by the articles of any company, but as a rule it is not.

**Improper or irregular calls.**—Only the directors of a limited company have the power to make calls, and this means directors properly appointed. Therefore, if directors have been elected at an irregular meeting, or are acting without having been appointed at all, a shareholder can refuse to pay calls made by them. I once knew of a call being made by the secretary of a company upon his own authority, without the directors knowing anything about it. That was an invalid call, as perhaps I need hardly say.

Again, the call cannot be enforced unless it is made by virtue of a resolution of the directors passed at a proper board meeting. It has been known before now for three directors out of four to hold a meeting to which the fourth director was never summoned. Nothing done at such a gathering has the slightest validity, and calls voted at such a hole-and-corner meeting should be, and can successfully be, resisted.

Again, it is necessary that the board meeting at which calls are made should be attended by a quorum of the directors. The articles of association generally contain a clause like this: "The number of directors of the company shall be not less than four, or more than eight, and three directors shall form a quorum." In such a case no board meeting is valid unless the necessary three are present, and a call made by two directors or one need not be paid. I once knew a director who effectually spoiled a little game by bearing in mind the necessity for a quorum. In this case four directors were to form a quorum. My friend was present one day when only the four attended, and he soon found himself



in a minority of one. The other three had made up their minds to adopt revolutionary tactics, to indulge in rash practices. When the minority found that his arguments were of no avail, he merely walked out of the room, with the result that no further business was possible. Before another meeting could be held my friend caused a meeting of the shareholders to be summoned and explained matters to them.

*The call must be for the purposes of the company.*—If not, it is illegal and cannot be enforced. For instance, suppose you take shares in a potted meat company, your shares being only half paid-up. One day the directors resolve to call up the remaining capital, and therewith to embark on the manufacture of soap. You can refuse to pay the call, because the directors cannot legally embark with the company's money upon a scheme not comprised in the memorandum of association (p. 608); and all calls made for such a purpose are unenforceable. Not only can you yourself decline to pay, but you can even stop the call being made on the other members. Suppose you attempt to do this, and the other members unanimously reply that they approve of the policy of the board. What then? It makes no difference whatever. You, as a shareholder, are entitled to see that neither your contribution nor any of the rest of the company's capital is used for objects outside the scope of the memorandum.

The directors, in making calls, are trustees for the shareholders, and must not make calls except for the shareholders' benefit. If there be any indirect motive moving them to make a call, that call is illegal.

**Notice of calls.**—When the directors decide to make a call, the first thing to be done is to give notice of the fact to all the shareholders. The notice must be a definite one, and must state either the gross amount called for, or the amount per share. Suppose, for instance, that you hold ten £5 shares, and the directors resolve to call up £1 per share, it is enough for the notice to state that you are called upon to pay £10, or to say that you are called upon to pay £1 per share.

No action can be brought against you for call money unless due notice of call has been given; neither can your shares be forfeited. Questions sometimes arise as to what is a proper notice. I have been consulted more than once by persons sued for call money, who have said, "I never received any notice." Let me say at once that this is not quite the point. The point is whether notice was properly sent; and it was properly sent if it was sent by post to your address on the register. One of the very objects of having a register is that the company may know the addresses of its shareholders. It becomes of importance, then, when you change your address, to notify the change to the secretary of the company, so that he can place your new habitat on the register. And if an action is brought against you for call money, and you plead in defence that no notice of call was given, you will lose the action if the officers of the company prove that a notice was posted to you at your registered address.

A very nice point may arise as to the liability for call money when the holder of the shares transfers them between the date of the call-resolution and the date when the call is payable. For a call is due on the day when the

directors resolve to make it, but is not payable until the day named in the notice. Thus, Smith holds ten shares in the Cokeless Coal Company, Limited, by whose articles twenty-one days' notice of call must be given. On the 1st of January the board of directors pass a resolution to call up 5s. per share. Notice is given to Smith to pay the call (£2 10s.) on the 22nd of January. On the 5th of January, Smith sells and transfers his shares to Robinson, and the transfer is registered on the same day. Who must pay the £2 10s. on the 22nd of January—Smith or Robinson? Mr. Buckley, Q.C., the eminent company lawyer, thinks that Smith must pay, because he was the holder of the shares when the call was made; but he (Mr. Buckley) thinks the point to be doubtful. It is quite competent for the articles of association to decide the point by a rule; and if you ever have occasion to think about it, you should first of all look up the articles of the company. If these are silent on the subject, you may take it as doubtful, and should make an agreement with the transferee that he shall pay the call in question, and that if he fails to do so, and you are compelled to pay, he (the transferee) will indemnify you.

**When the shareholders' liability ends.**—To begin with, as soon as the shares you hold are fully paid-up, you cannot be called upon to contribute any further.

But it very often happens that a company is wound-up before the members have paid up the nominal value of the shares. And in such a case they are liable to be called upon to pay the rest so far as is necessary to satisfy creditors and to meet the expenses of the winding-up. The persons who are liable to be called upon to meet the liabilities of a company in the event of its being wound-up are called "contributories"—a term taken from section 74 of the Companies Act, 1862, which runs, "The term 'contributory' shall mean every person liable to contribute to the assets of a company under this Act, in the event of the same being wound-up."

**Past and present members** are declared to be liable as contributories by section 38 of the same statute. The liabilities differ very considerably in their character, and require some attention.

When a company is being wound-up, the proceedings are something like those in the bankruptcy of an individual. That is, the property of the company is sold, and the proceeds are used, first, to pay the expenses of the liquidation and, second, to pay debts owing by the company to its creditors. If the company's assets are sufficient for these purposes, no shareholder will be called upon to contribute anything. If more than enough to pay expenses and debts should be realised, the balance will be divided amongst the shareholders, *pro rata*, in proportion to the number and value of shares held.

As a rule, however, these conditions do not prevail. A company is rarely wound-up when its property is sufficient to pay its debts; and so it becomes necessary to come upon the shareholders to contribute. The person who has charge of the winding-up—whose business it is to see that all assets are realised and debts and expenses paid—is called the liquidator. To assist him a committee, called the committee of inspection, is appointed; and it is the business of the liquidator, with the consent of the committee, to make out



lists of contributories. The first list, generally called "List A," contains the names of all **present members** whose shares are not fully paid-up, with the number of shares held by each of them. As soon as it is known how much the debts amount to, and a calculation has been made of the amount of the winding-up expenses, the committee of inspection passes a resolution to make a call of so much per share on all contributories in List A. Thus the debts and expenses amount to £5,000. There are 600 present-members, holding amongst them 4,000 shares of the nominal value of £1 each. A thousand of these shares are fully paid-up, so that no further liability attaches to them; and this reduces the present contributory members to 580. The 3,000 shares held by these members have only 10s. each called up, leaving a further liability of 10s. per share. It will therefore be necessary to call up the whole of the money. A resolution to call up 10s. per share is therefore passed by the committee of inspection, and notice thereof is sent to the 580 present-member contributories. If any of these refuse to pay, the Court will order them to pay and execution will issue against their lands and goods to extract the money. But judgment and execution are one thing, getting the money is another; and the liquidator has another card to play if this one fails.

**Past members.**—In addition to List A of contributories, there is always a List B. The first consists, as I have said, of present members. The second contains past members. And the law as to List B is considerably more complicated than that relating to List A.

As I have said already, unless there is some rule in the articles of association to the contrary, a shareholder can always transfer his shares to whomsoever he will—whether the transferee be a pauper or not. It would be easy, then, for a shareholder to hold part-paid-up shares so long as the company pays, and, as soon as there was the likelihood of a crash, to part with them to an utterly impecunious person who could not find the money to meet further calls. But section 38 of the C.A., 1862, here interposes. It enacts that all persons who have been members of the company within the year previous to the winding-up shall be contributories, unless the person who now has the shares pays the contribution in respect thereof.

It works out like this. Dutout is the holder of 100 £1 shares in the Saponaceous Sponge Company, Limited, upon which 10s. per share has been paid up. On the 1st of April, 1897, Dutout transfers his shares to Impekune. Why the transfer takes place does not matter in the least. On the 1st of February, 1898, the Court makes an order to wind-up the company, which has gone to smash beyond hope of recovery. The liquidator settles his two lists of contributories. On List A he places Impekune, the present holder of the 100 shares, and on List B he sets down Dutout, because the latter was a member of the company within a year of the winding-up order. A call of 10s. per share is made, and Impekune does not pay. An action is brought against him, and £10 is recovered that way.

Then the question arises whether Dutout can be made liable for £40—the rest of the call. Not necessarily—though he was the holder of the shares within the statutory period. Why not? Because by subsection (2) of section 38 (C.A.,

1862), "No past member shall be liable to contribute in respect of any debt or liability of the company contracted after the time at which he ceased to be a member."

Let me give a practical illustration. On the 1st of April, 1897, when Dutout ceased to be a shareholder, the company owed £2,000, as follows:—£1,000 to its banker, £400 to Jones & Co., and £600 to Smith & Co. Between the 1st of April, 1897, and the 1st of February, 1898, another £2,000 worth of debts has been heaped up; but the £400 and £600 have been repaid to Jones & Co. and Smith & Co. You see, therefore, that only £1,000 which was owing by the company when Dutout ceased to be a member was also owing at the date of the winding-up. And it is only towards this £1,000 that Dutout is bound to contribute. We will suppose for the sake of argument that twenty other shareholders, each holding 100 shares, transferred their holdings to Impekune on the 1st of April, 1897, and that Impekune has not paid the call made by the liquidator. These twenty past members will also find themselves on List B; and will be liable just as Dutout is—*i.e.* to contribute towards the £1,000 aforesaid.

The result of the calls on present members (List A) is that £1,000 has been realised. Deduct £500 for expenses and it leaves £500 for creditors. The debts are £3,000; and dividing the £500 proportionately will give each creditor 3s. 4d. in the pound. The old creditor, the banker, will receive out of this fund £166 15s.; leaving £833 5s. to come upon the past members (List B). As I have said, there are twenty-one of these—each holding 100 shares. Now, a call of 10s. per share on these members would produce too much—£1,050. A call of 8s. per share will cover it, as such a call on 2,100 shares will bring in £840—rather more than 'enough to settle the balance due to the banker.

So you see that there may be an advantage in having a long-standing debt, when your debtor is a limited company. You also see that past members are likely to get off lighter than present ones. And, further, you see that though it may be easy enough to get rid of your shares in a shaky company, it is not so easy to rid yourself of your liability.

To complete this branch of the subject, it should be said that a past member who is compelled to contribute to the assets of the company is entitled to an indemnity from the present members who hold the shares. Thus, I held twenty shares (not paid-up) in a company; which shares I sold to Jones. Within a year of the sale the company was wound-up; and Jones refusing to pay a call, I was compelled to pay £9. I had the right to sue Jones for that £9. Thus the past member contributory is put in the position of a surety or guarantor. The present member is primarily liable; but if he fails to meet his responsibility the past member becomes liable; and he in turn can proceed against the present member.

**Forfeited shares.**—I have shown on page 625 that the articles of association sometimes allow the board of directors to forfeit shares. When shares have been so forfeited, the shareholder in question cannot be made a contributory as present member; but he can be made liable as a past member, subject to the one-year rule. To give an instance:—If Smith forfeit his shares within one year before the



winding-up, he can be put on List B. And if Smith transfer his shares to Jones, and Jones forfeit them, and the company be wound-up within a year of the transfer by Smith to Jones, both Smith and Jones can be put on List B. Plainly, they both come within the words of the Act, having been members of the company within a year prior to the commencement of the winding-up.

**Debts due by the company to contributories.**—In the ordinary course of things, if you owe money to Jones, and he owes money to you, the right called by English lawyers “set-off” and by Scottish lawyers “compensation” exists. That is, if Jones becomes bankrupt, and you are called upon to pay what you owe him, you can deduct what he owes you, and pay only the balance.

But when you are on the list of contributories to a company, and the company owes money to you, you cannot always claim to deduct your debt from your contribution. Suppose, then, that you are a shareholder in a company which is being wound-up, and a call amounting to £50 is made upon you, and the company owes you £40, *in your capacity as a member of the company*, you cannot deduct the £40. Neither can you claim as a creditor until all the other debts of the company are satisfied.

Take this case. I hold shares in the X Company, Limited. On the 1st of June, 1897, a dividend is declared. Of this dividend I am entitled to £40, but for some reason it is not paid to me. Or, again, I may be a director, entitled to a guinea fee for every board meeting that I attend, and entitled to twenty guineas arrears of fees. If the company be wound-up, I cannot claim either of these sums until all the other debts of the company have been satisfied in full. If, after paying the other debts, there is any money left in hand, I shall then, and then only, be allowed to come upon the liquidator for the dividends or director's fees due to me. Understand, please, that this only applies to money due to me as a member of the company. Therefore, if I am a director without being a member, I come in as an ordinary creditor. But this would rarely happen, since most companies' articles make it compulsory for every director to hold so many shares—called “qualification shares.”

**Liability for shares taken under misrepresentation.**—As previously stated (p. 615), when you have been induced to take shares in a company by a misrepresentation—for instance, a false statement in the prospectus—you have the right to cancel the contract and to compel the company to remove your name from the register of members. This right is one that ought to be exercised immediately on discovering the true facts, for if you delay you lose your right (p. 616).

Sometimes it happens that you are thus misled into taking shares in a company and do not discover the fraud until after the company has begun to be wound-up. That is unfortunate, because if you have not brought your action to have your name removed before the winding-up commences, you cannot bring it afterwards. In other words, it is no defence to a claim against a contributory (whether a past or present member) that he was induced by misrepresentation or fraud to take the shares. For my part, I think this law very harsh; but the Companies Acts leave no doubt on the point.

If you have been put on the register of members absolutely without your

consent, you can resist being called upon to contribute when the company is wound-up. This seems obvious, but it does not always look so obvious in actual practice. Thus, if you apply for shares in the way I have suggested that you should apply, *i.e.* subject to the condition that so-many shares (say, 20,000) are applied for and allotted to responsible subscribers (p. 619), and the directors allot fifty shares to you although 20,000 are not applied for nor allotted in all, the allotment is bad to begin with. In other words, there is no agreement by you to take shares, because if you make an offer subject to a condition that is to happen before it can be accepted, and the condition does not happen, your offer vanishes into thin air. There is no offer, in fact. And, as a necessary consequence, there is no contract, because every contract consists of an offer on the one side and an acceptance of that identical offer on the other. Suppose, now, that you receive a letter of allotment, and find that 20,000 shares have not been applied for, your course is to write at once and point out the facts to the secretary, and if your name is not instantly removed from the register, and before you have time to go into Court the company begins to be wound-up, you can lawfully resist being called upon to contribute. For, though your name appears on the register of shareholders, you are not really a member.

**Shares—ordinary and preference—and Stock.**—By Table A (C.A., 1862), Article 23, “the directors may, with the sanction of the company previously given in general meeting, convert any paid-up shares into stock.” Sometimes this article is slightly varied in the articles of association of particular companies, but as a rule the statutory form is relied on.

The chief points of difference between stock and shares are two ; namely, (1) Stock is always fully paid-up. Therefore if you buy stock of a company you may be quite sure that you will never have to pay any calls. (2) Stock is more easily dealt with than are shares, because if you transfer a share, you must transfer a whole one—there is no such thing as a half or quarter of a share. But you can deal in stock in fractional parts. Thus, if you hold five £100 shares in a company, and wish to sell £150 worth, you will be unable to do so ; but if the company converts its shares into stock you can dispose of £150 worth, or £160 worth, and so on. Some companies allow you to transfer any value of stock. Thus, I bought £289 nominal value of a certain railway stock the other day. But this would be impossible in some companies, where you are not allowed to split up stock into fractions of less than £10. Thus, you could transfer £280 or £290, but not £281-2, -3, and so on. This is a point to keep your eye on when you wish to buy or sell stock. Now as to preference and ordinary shares (or stock). The difference is known to most people, but not to all—especially to women ; and I should like to make it clear. Suppose you think of investing in the Otaheite Electric Lighting Company, Limited, of which you have heard good accounts. A friend of yours, “in the know,” advises you to put a hundred or two into the venture. Upon inquiry you find that there are two kinds of shares in the company—5 per cent. preference and ordinary. The shares in each case are of the nominal value of £10, and you are doubtful which of the two to apply for. In these circumstances allow me to give you one or two hints.



First of all—supposing the company to be a sound one—is it likely to be prodigiously successful? Second, supposing the chances of profit to be high, is it likely that they will be high to begin with? Or will they be small at first, rising as time goes on? Are the profits likely to fluctuate to any considerable extent? May the company clear thousands of pounds one year and next to nothing the next? Third, can you afford, if need be, to let your money earn nothing for a few years, or are you really living on the interest?

All these things have to be considered, because by preference shares one means shares that are preferred—or come first for their interest. Thus, if there are 10,000 preference and 10,000 ordinary £10 shares in the Otaheite Electric Lighting Company, and the company earns £6,000 after paying expenses in its first year, the preference shareholders will receive their 5 per cent. interest in full. Five thousand pounds will be required to pay such a dividend, leaving only £1,000 to be divided amongst the ordinary shareholders—about 1 per cent. In the case of a new commercial undertaking this may go on for some time, and it is only when the company clears £10,000 in one year that the ordinary shareholders will have a 5 per cent. dividend.

But if the venture is really successful, and is not over-capitalised, when it gets well under weigh the ordinary shareholders may have considerably the best of it; for they are entitled to all the profits after the agreed rate of dividend on the preference shares has been paid. So that if the company makes a net profit of £20,000, £5,000 only will go to the preference shareholders, and the rest to the ordinary—being at the very respectable rate of 15 per cent.

Thus you see that preference shares form the safer investment—the least liable to fluctuate, and are the better kind to hold in a company that is only moderately successful. But the ordinary shareholder is the man who reaps the benefit if the company is ultimately successful, though in bad years he bears the brunt of the loss.

For my own part, I prefer to put my money in undertakings where there is only one class of shareholders—the ordinary. It is the safest and the least speculative in the long run.

**Preference both as to interest and capital.**—You sometimes see, when preference shares are offered for subscription, an announcement that “these shares are preferred both as to capital and dividend.” This phrase means that not only will the preference shareholders receive their full dividend before anything is paid to ordinary members, but also that if the company is ever dissolved, the preference shareholders will have the first claim to their capital. For example, if the company's capital is £200,000, half preference and half ordinary shares, and on the winding-up there is, after paying debts and expenses, £130,000 for division amongst shareholders, the preference shareholders will be paid in full, leaving only £30,000 for the ordinary members. But you should note that unless preference shares are expressly issued as “preferred both as to capital and dividend” (any words to the same effect will do), they are only preferred as to dividend. That is, they have first claim for dividend, but on winding-up they share in the capital along with the ordinary shareholders. So that in the above example, supposing the preference shares not to be “preferred as to capital,” the £130,000 will be

divided equally amongst all shareholders—a dividend of 13s. in the pound all round.

*Cumulative preference shares* are of a slightly different kind. Suppose a company issues 5 per cent. preference shares (not cumulative) to the value of £10,000. The first £500 of the year's profits go to pay the 5 per cent. But suppose the whole profit of the year only comes to £400, the preference shareholders must be content with 4 per cent., and if the next year's profits are £5,000 the preference shareholders are only entitled to their 5 per cent. for that year. The 1 per cent. unpaid the year before is not made up out of the extra profits of the succeeding twelve months. But if the shares had been cumulative preference the case would be different; for the shareholders would be entitled to have their 1 per cent. made up to them as soon as ever the amount was earned.

**Debentures** are in a different position. I daresay you all have a rough idea of what a mortgage is. It is when the owner of any property "borrows money on it," as it is called. That is, he conveys it to the lender to secure the repayment of the loan and interest. The way this conveyance operates may be seen by taking the case of a bill of sale. Nicholas borrows money from James, and at the same time executes and gives to James a document promising to repay the loan with interest on a particular day, or particular days. And if the interest and loan are not paid as promised, the document authorises James to come and take Nicholas's furniture and sell it, and repay himself out of the proceeds. In the meantime, so long as the loan continues, Nicholas cannot part with the furniture because it legally belongs to James.

Roughly speaking, debentures are something of the same kind. When a company wants to borrow money it generally borrows by means of debentures. Say that £20,000 is required: the company will issue 200 debentures of £100 each, bearing a fixed rate of interest, say 6 per cent. in a speculative company, 5 per cent. in a moderately safe company, and 4 per cent. or even less in a thoroughly sound company—an old-established brewery, for instance. The amount of interest offered is invariably in inverse ratio to the soundness of the security, and the security given is generally the whole property and undertaking of the company. Debentures are not like shares and stock—preference or ordinary—for the holders of shares are only entitled to a dividend when the company has earned a profit. The holders of debentures, on the other hand, are entitled to their interest in any event, whether the company is prospering or not.

And the debenture holders have this further advantage—if their interest is not paid, they are entitled to have someone appointed as receiver of the company; that is, some person appointed by the Court to take possession of and manage the company's property and business, and to sell the same (with the Court's approval) in order to pay the debenture holders their money. Moreover, if the company should be wound-up, the debenture holders are far better off than the shareholders, or even than ordinary creditors. For they (the debenture holders) have a right to be paid absolutely first before any creditors, after deducting the expenses of winding-up. On the whole, there are few better securities for the investor than the debentures of a first-class company—provided



always that the company has some tangible property; and many such debentures stand high in the market.

The kind of debentures above described are called "mortgage debentures," because they have an effect similar to that of a mortgage. They "charge" or mortgage the whole or part of the company's property and undertaking.

There are other debentures, however, which are not mortgage debentures. They are only promises to pay a certain amount borrowed, with interest, on a particular date. They do not give to the holders thereof any right over the company's property. I need hardly say, perhaps, that this kind of debenture is by no means so good a security as mortgage debentures.

You often see, in connection with the issue of debentures, that "Mr. Squire and Mr. Lord are trustees for debenture holders." Or you will see that "The debentures are secured by a deed comprising such and such property." All this has reference to what company lawyers call "a covering deed." This document is one whereby certain property is transferred to certain persons to hold as trustees for the debenture holders; the terms of the trust being that if the interest on the debentures is not punctually paid, or if the capital is not repaid on the day named, the trustees can take possession of the property and deal with it for the advantage of the debenture holders.

Take the case of a well-known brewery, which was turned into a company a little while ago. The property included the whole of the brewery premises and about twenty public-houses. Debentures were issued to the amount of (I think) £50,000 at 4 per cent., and were covered by a deed in which the brewery and the twenty public-houses were conveyed to two trustees. Should the company fail to pay the debenture holders their interest punctually, it is the trustees' duty to seize the brewery and the public-houses, collect the rents of the latter, let the brewery, and so pay the interest. For my part, I think it much safer for the debenture holder to be protected by a covering deed.

Elsewhere I have stated that shares cannot be issued at a discount; that is, you cannot have a £100 share for which you agree to pay the company only £95. This does not apply to debentures. There is nothing to prevent them from being issued at a discount. For debentures, as I have pointed out, are not shares, and if the company issue a £100 debenture to you for £95, it is quite within their power to do so. You cannot be compelled to pay the other five pounds, and will be entitled both to interest on £100 and the payment of £100 capital when the security is redeemed.

### III. THE MANAGEMENT OF A COMPANY AND THE RIGHTS OF SHAREHOLDERS.

In carrying on the affairs of a company, the directors, officers, and shareholders must be guided by three things: the Companies Acts, the memorandum of association, and the articles of association. The provisions of the statutes are so numerous and so minute that I can hardly pretend to deal with them in great detail. I shall therefore confine myself to those points which I deem to be of the most general interest and importance both to those readers who are directors and those who are shareholders.

This book is not written for the benefit of the company-monger, nor for

the guidance of the "guinea-pig." Still, as anybody may become director of a company, the average man may be glad to learn something of those things that ought to be done, and still more of those that ought to be left undone, in the management of one of these concerns. Disclosures made of recent years in the Courts show how utterly ignorant are many directors of the duties of their position, and how entirely at the mercy of an unscrupulous colleague who pretends to know all about company management. Look at the *Liberator* case. It is pretty safe to say that at least one of the directors who saw the inside of a gaol sinned through pure ignorance; and, as he found out to his cost, ignorance of the criminal nature of an act is no defence to a criminal prosecution. If it were so, you would hardly ever get anybody convicted; for you would not only have to prove that he did the act, but that he knew it was criminal.

It should be stated at once that no company can ever undertake any business or do any act outside the scope of its memorandum of association; and that is why you should always take care, in floating a company, to make the memorandum wide enough (pp. 607-8). It happens sometimes that a company wants to undertake some business of a kind not contemplated when it was first formed. It may also happen, and occasionally does, that the members wish something to be done that cannot be done under the memorandum—for instance, to issue preference shares. The only way to accomplish these objects is by **altering the memorandum of association**. It is not by any means advisable to make such an alteration unless for very good reasons indeed, as the process costs money. Until the 18th of August, 1890, it could not be done at all; but by the Companies (Memorandum of Association) Act, 1890, a limited company is allowed to alter its memorandum with the leave of the High Court [or Court of Session] for any one or more of the following objects:—

- (1) To carry on its business more economically or more efficiently; or
- (2) To attain its main purpose by new or improved means; or
- (3) To enlarge or change the local area of its operations; or
- (4) To carry on some business or businesses which in existing circumstances may conveniently or advantageously be combined with the business of the company; or
- (5) To restrict or abandon any of the objects specified in the memorandum of association or deed of settlement.

Before allowing any alteration, the Court must be satisfied that sufficient notice has been given to every holder of debentures, and to all other persons whose interests are likely to be affected by the alterations. This notice is to be given in order that the debenture holders or other persons may appear in Court and object. Besides these, there are the company's creditors to be considered; and their rights must be protected by the judge who is asked to sanction the alteration. Every creditor must be informed of the proposed alteration, and if he does not consent to it, his debt must be paid, or security [caution] given for it, before the judge can permit the alteration to be made.

It is important to remember that an office copy of the judge's order, and a printed copy of the altered memorandum, must be delivered to the Registrar of Companies within fifteen days from the date of the order. If not so delivered,



the company is liable to a fine not exceeding £10 a day for every day during which the omission continues.

**Issuing different kinds of shares** is an illegal proceeding unless the memorandum of association provides for it. Thus, suppose that the memorandum states the capital of the company to be "£200,000, divided into 2,000 shares of £100 each," neither the directors nor even the shareholders by a unanimous resolution can direct that (say) 500 of these shares shall be preference shares. It has been tried once or twice, but has always been declared to be beyond the company's power. Indeed, it is beyond the company's power, unless the memorandum expressly allows it, to issue any kind of shares entitling the holders thereof to rights other than those of all other shareholders. That is, no preferred or deferred shares can be issued unless the memorandum sanctions such an issue. This does not apply to **debentures**, which are not shares (p. 633) and which can be issued by the directors if they are authorised to do so by a special resolution of the shareholders. It should be borne in mind, however, that if, by the memorandum of association, or by the articles, the company is allowed to issue debentures up to a certain amount, that amount must not be exceeded.

**Debenture Stock.**—But although a company may issue debentures without having an express power to do so in the memorandum, it is far otherwise with debenture stock. Any company desiring to issue such stock must have a power to do so in its memorandum. The difference between debentures and debenture stock is this. A debenture is merely a promise by the company to pay back borrowed money at a certain time, and to pay interest until the loan is repaid. Debenture stock is where the company, in consideration of a certain sum down, promises to pay the stockholder a perpetual (or redeemable) annuity of so much. Probably (in fact, generally) there will be a provision to this effect—"The company shall have the option to redeem this stock at such a price on such a date." In fact, debenture stock is very like such government securities as Consols. Debentures are more like mortgages or bills of sale.

**The register of members.**—Every company is bound to keep a list or register of its members; and everybody is entitled to inspect this book at any time between 10 a.m. and 4 p.m. on a business day [*i.e.* not Sunday or a Bank Holiday]. Shareholders are entitled to free inspection; but any other person may be charged a shilling—not more (C.A., 1862, sections 32-33). For thirty days in the year the company has power to close the register, and during that time no new members can be registered nor can any inspection be had; but before such closing, the company must give notice by advertisement in a newspaper circulating in the district where the registered office is situated.

This right of searching the register of shareholders may be valuable in many ways. For instance, if you hear ugly rumours about the position of a company of which you are a member, and you want to have some light thrown on those rumours, it is not a bad plan to search the register frequently—keeping an eye on the shares held by the directors and promoters. If you find these gentlemen to be selling you have some ground for the suspicion that all is not healthy.

**What the register must contain.**—The register contains the names of all the members, together with the address and occupation of each one, and

the numbers of the shares held by him. I need hardly point out the usefulness of this information to the members of the company. If the management of the company displeases you, and you think the directorate ought to be changed, you can easily communicate with your fellow-members on the subject, and point out by circular or otherwise the enormities of the present board, individually and collectively, and try to form the opinion of the shareholders in the direction of appointing a new set of men.

I have already pointed out the necessity of every shareholder notifying changes of address to the secretary of the company, because to the shareholder's registered address will all notices of meetings, calls, and dividends be sent; and the officials of the company will have discharged their duty if they send these notices to the address on the register.

Besides each member's name, address, and number of shares, the register must contain the amount paid-up or agreed to be considered as paid-up on that member's shares; with the date on which he was entered as a member, and the date on which he ceased to be one (C.A., 1862, section 25).

There is a heavy *penalty* for any company failing to comply with these requirements—£5 a day for every day during which the default continues. Besides this, every director or manager who knowingly and wilfully authorises or permits the contravention of the statute is liable to the like penalty.

Every company with its capital divided into shares must make an **annual list** of its members, their addresses and occupations, and the number of shares held by each of them; and a summary of (*a*) the amount of capital, and the number of shares into which it is divided; (*b*) the number of shares taken in the company; (*c*) the amount of calls *made* on each share; (*d*) the total amount of calls *received*; (*e*) amount of calls unpaid; (*f*) amount of shares forfeited; (*g*) names, addresses, occupations of and number of shares held by all persons who have ceased to be members of the company since the last annual list.

This list must be made not later than fourteen days after the annual general meeting, and a copy must be transmitted to the Registrar of Joint Stock Companies within seven days after the last of the fourteen. The maximum penalty for non-compliance is £5 per day on the company and on any director or manager who authorises or permits the non-compliance (C.A., 1862, sections 26, 27).

**About penalties.**—The penalties mentioned in the last two subsections are recoverable before magistrates in petty sessions in England and Ireland, and before two or more justices or the sheriff of the county in Scotland. The Registrar of Companies is the person to take action; and he may be set in motion by any person—such person being what is known as a “common informer.” When the magistrates inflict the penalty, they may order any part of it to be given to the informer; and thereby hangs the explanation of certain proceedings sometimes reported in the daily press. There are men who make it a sort of business to search the Register of Companies at Somerset House, to find out whether companies have filed their annual lists. Should one of these persons discover a company whose list is not filed, or whose list is incorrect, off he goes and informs. The company is haled up before the nearest magistrate, and fined



by him ; and then the informer asks for some of the fine to be awarded to him—as a reward, I suppose, for his zeal in enforcing the law. As a rule, he does not make much out of it. Indeed, I read in the papers the other day of a case where a London alderman fined a company the sum of one penny, and did not even give the common informer a share of that. This kind of fine, however, will only be imposed where the mistake has been inadvertent, and where the proceedings are undertaken for purposes of annoyance—or worse.

**Importance of keeping the register of members correctly.**—It is advisable, not only for the sake of complying with the Companies Act, 1862, and avoiding the penalties, to keep the register of members correctly, but it is also important in other respects. For the register is regarded in a great measure as a public document, to which all have access on paying the small fee imposed by the Act ; and if any person, after inspecting the register, acts on the facts as they are there stated, the company will not be allowed to deny the correctness of the register. This is on the principle of law called by (English) lawyers, “estoppel.” The principle is that if I represent the facts to be so-and-so, and you act upon my statement, I shall not be allowed to turn round and say (after you have so acted) that the facts were not what I represented them to be. This is quite apart from the question whether my statement of facts was wilfully fraudulent or no. The way this works out with regard to a company's register of members is as follows :—Jones had ten £1 shares of the Unowat Company, Limited, part paid-up. These he desired to sell to Smith, who knew that three calls of 5s. each had been made and who went to the register of members to see whether Jones had paid them all. There he found entries to show that Jones had paid every call, and he accordingly bought the shares and took a transfer. What was his surprise to have a demand from the company calling upon him to pay a further call of 5s. per share, and 5s. per share arrears of calls. An interview with the secretary revealed the fact that Jones had never paid the third call. “But,” said Smith, “I inspected the register, and found him credited as having paid it.” “True,” the secretary replied blandly, “but that was a mistake, a mere clerical error, for which we are very sorry.” Smith thereupon paid the new call, but refused to pay the arrears ; and when the company sued him for the amount in the court, he pleaded that he ought not to be made to pay for the clerical errors of the company's officials. And the judge upheld the contention ; so that Smith, though not actually the owner of fully paid-up shares, was the owner of shares that the company were bound to treat as fully paid. Which was all the same as far as Smith was concerned.

**No trust on the register except in Scotland.**—No company in England or Ireland is bound to register any trust in its books. This is really to save the company from trouble and responsibility. Thus, Brown dies, and leaves (amongst other things), 1,000 £10 shares in Cassell and Company, Limited, to me as trustee, to receive the dividends and pay them to his widow every year. I shall have to get the shares transferred in Cassell and Company's books to my name ; but the registrar of the company cannot enter it “P. M. Orton, of 4, New Cut, E.C., Barrister, trustee for Mr. Brown, of etc.” He must only enter my name, address, and occupation, and must treat me as absolute owner of the shares.

In Scotland there is nothing to prevent the trust from being registered on the company's books, unless the articles of association say something to the contrary.

**Registered office.**—Every company is bound to have an office where all communications can be addressed, and notice of the situation of this office and of any change of address must be sent to the Registrar of Joint Stock Companies in London, Edinburgh, or Dublin, as the case may be. There is a penalty of £5 a day for any breach of this law (C.A., 1862, sections 39 and 40).

**Publication of name.**—On the outside of the registered office, and of every place where the company's business is carried on, there must be painted or affixed the name of the company, in a conspicuous position and legible characters. The name must also appear on all bill-heads, circulars, orders for goods, bills of exchange, cheques and documents whatever—including bills of parcels, invoices and receipts. The maximum penalty for not keeping up the name outside the office, etc., is £5 a day; and any director or manager who signs or issues a document as above without the name being on it is liable to a penalty not exceeding £50. Moreover, a director or manager signing a cheque, bill of exchange, promissory note, or order for money or goods not bearing the company's name, is personally liable on it (C.A., 1862, sections 41, 42).

**Register of mortgages.**—By section 43, C.A., 1862, the company is required to keep a register of all mortgages and charges affecting the property of the company. The register is intended for the protection and information of creditors and shareholders, to whom with their solicitors and agents the register is always open. The entry must give short particulars of the property mortgaged or charged, and to whom, and the amount. There is a heavy penalty of £50 on every director, manager and officer who wilfully authorises or permits an omission to make such an entry.

Suppose a company mortgages or charges some property to you, and the secretary makes no entry of the transaction—what then? Is your mortgage bad? The answer is, that if you are an outsider, one who has no control over the books of the company, the mortgage is good. But if you are a director, or the secretary, or any other officer who might have seen that the entry was made, your mortgage will not be good as between you and other creditors of the company who have been misled. To take an instance: the directors of the Native Iron Ore Company, Limited, lent money to the Company upon a charge of certain property. This charge was registered after a fashion, but not properly; that is, there was no description of the property charged. When the company was wound-up, these directors were not allowed the advantage of their security—that is, they came in just like ordinary creditors.

But it has been decided that unless the other creditors have been misled by the omission to register, they cannot complain; and the charge will stand. Thus, certain directors lent money to company upon a charge, which was never registered. Afterwards the company went into liquidation, and when the directors claimed the benefit of their security it was objected that the charge was unregistered. But the directors were allowed the benefit of it, all the same. "Why?" you ejaculate, "this is the same case as the last, and the



decision is quite the reverse." Good! Still, lest you should do the Court the injustice to suppose that it gives conflicting decisions, as the Irish judge did, just for the sake of variety, let me tell you that in the last case the complaining creditors had never looked at the register of mortgages and charges. Therefore they could have suffered no damage because something was not recorded there. Therefore they had nothing to complain of if the charge were allowed to stand.

**Limited banking companies, insurance, deposit, provident and benefit societies** established under the Companies Acts must, before beginning business and also half-yearly on the 1st of February and the 1st of August, so long as the company or society continues, make a statement in the form here given:—

The capital of the company (or society) is divided into        shares of £        each.

The number of shares issued is

Calls to the amount of £        per share have been made, under which the sum of £        has been received.

The liabilities of the company on the first day of January (or July) were:—

Debts owing by the company to sundry persons:—

On judgment, £        .

On specialty, £        .

On notes or bills, £        .

On simple contracts, £        .

On estimated liabilities, £        .

The assets of the company on that day were:—

Government securities. . . Consols, £        . (Giving a list.)

Bills and notes, £        .

Cash at bank, £        .

Other securities, £        .

This form must be adhered to as nearly as possible; and a copy of the statement must be posted up in a conspicuous place in the registered office, and also in every place where the company carries on business—factory, mine, workshop, and so on. There is a penalty of £5 a day on the company omitting this duty, and also on every director or manager who knowingly and wilfully authorises or permits the breach. Moreover, every member and creditor is entitled to a copy for the sum of sixpence.

**Meetings. Ordinary general meetings.**—A general meeting of every limited company must, by statute, be held at least once every year. Any number of other general meetings *may* be held, but one *must* be (C.A., 1862, section 49). The first general meeting must be held within four months of the formation of the company; that is, within four months from the date when the memorandum of association was registered (C.A., 1867, section 39). If no other date is fixed by the articles, or by resolution, the first Monday in February is the date for holding the ordinary general meeting. If any "special" business is to be proposed at an ordinary meeting, the notice of meeting must state the nature of that business.

Besides ordinary general meetings there may be **extraordinary general meetings**. An extraordinary general meeting is any meeting which is not the ordinary, or annual one. The directors may summon an extraordinary

general meeting whenever they think proper ; but there are occasions upon which they *must* summon them. These occasions are, whenever at least one-fifth of the members signs a requisition to the board, asking them to call such a meeting. Such a requisition must state the objects of the extraordinary general meeting, and must be left at the registered office of the company. The extraordinary general meeting is a great weapon in the hands of shareholders who are dissatisfied with the conduct of the directorate ; and sometimes directors have tried to burke the calling of meetings which they were afraid or unwilling to face. So that if you are a dissatisfied shareholder and wish to bring the directors speedily to book—either to obtain satisfaction for past misconduct, or to prevent the board from continuing some mischievous and dangerous course—be sure you send in your requisition in proper form. The things to be remembered are :—

(1) At least one-fifth of the shareholders must sign the requisition. It is best to get more than a bare fifth, if you can, because otherwise, unless all the shares are issued, the directors may have issued a few since the time when you inspected the register.

(2) The object of the meeting must be clearly stated. Do not be vague or general, but put down plainly in black and white what it is you wish your fellow-members to discuss. If you want them to pass any resolutions, put these resolutions down on the requisition in plain terms ; because unless you do so they cannot be discussed.

(3) The object of the meeting must be legal and proper. In other words, if the proper number of members sign a requisition to call a special general meeting to pass a resolution pledging the company to do something that the company cannot by law do, the directors need not take any notice of the requisition.

But supposing your requisition to be good, and the directors refuse to call a meeting—or neglect to do so. What then? Well, you have two courses open to you. You can either go to the Court and ask the judge to compel the directors to summon the meeting, or you and your fellow-requisitionists can summon it yourselves. I recommend the latter course as being the less troublesome and less expensive. You can get the names of all the shareholders from the register (p. 636), and give them notice of time and place. Now be careful to summon your meeting properly. It is as easy to be right as wrong, and if you omit anything required by the Act you will fail in your object ; because whatever the meeting does will have no effect.

**How to summon a special or extraordinary general meeting.**—Seven days' notice must be given at least, specifying the place, day, and hour of the meeting, and also the nature of the business to be discussed. The notice must be sent to every member at his registered address, so as to reach him in due course of post at least seven days before the appointed day. It is not necessary to use a registered letter ; and if convenient the notice may be left at such address, instead of being sent by post. When the meeting is summoned by the directors, it may be signed by one of them or by any officer of the company. When it is summoned by requisitionists (*see* preceding paragraph), it may either



bear all their names or be signed by one on behalf of himself and his fellows. It is specially important that the notice should state clearly the object for which the meeting is called ; for no business can be discussed except that specified in the notice, because all business done at an extraordinary general meeting is special business. The rules here given may be varied by the articles of the company, but in most companies they are the same. If the articles are silent on the point, the above rules prevail.

No general meeting, whether ordinary or special, is valid unless a **quorum** of members be present. The articles ought to fix the number to form a quorum ; but if they do not, the rule is as follows : If, at the time of the meeting, there are ten members or less on the books, five form a quorum ; if over ten, there shall be one added to the quorum for every additional five up to fifty, and one for every ten after fifty. In no case shall the quorum be more than twenty members. But an ordinary general meeting where no quorum is present may declare a dividend.

**Special resolutions.**—For the accomplishment of certain objects it is necessary to proceed by special resolution. What these things are I shall specify presently. Be careful, please, to draw the distinction between a special resolution and a resolution passed at an extraordinary general meeting ; for it is not every resolution passed at a special or extraordinary general meeting that is a special resolution. Moreover, not all “special” business need be transacted by special resolution. When it is required to pass a special resolution, the following steps must be taken :—

First, a general meeting (either ordinary or extraordinary) must be called.

Second, the notice calling the meeting must set out the special resolution that is to be proposed.

Third, the resolution must be passed by a majority of three-fourths of the members present who are entitled to vote.

Fourth, a second general meeting must be called, not less than fourteen days and not more than a month after the one at which the special resolution was adopted.

Fifth, this second meeting must confirm the special resolution adopted at the first meeting. No amendment is allowed, but a three-fourths majority is not necessary ; it is enough if the resolution is confirmed by a bare majority of the members present qualified to vote.

Sixth, a copy of the resolution must be registered with the Registrar of Joint Stock Companies within fifteen days from the confirmation, under a penalty of £2 a day for the company ; and the like penalty is imposed upon every director and manager who knowingly and wilfully authorises or permits the default.

If any of the first five requirements be not complied with, the special resolution is altogether invalid. Any member may propose a special resolution on giving the proper notice ; though if he wishes to have an extraordinary general meeting called he must observe the rules laid down on the preceding page.

**Things which must be done by special resolution.**—As I have already told you, the memorandum of association of a company cannot be altered except

by leave of the Court (p. 635). Yet in one or two matters there are exceptions to the rule. A company limited by shares may, by special resolution, **increase its capital** (a) by the issue of new shares; (b) by consolidating and dividing its capital into shares of larger amount than its existing shares (C.A., 1862, section 12). This is done by a special resolution to alter the articles of association, passed and confirmed in the way already described (p. 642).

The issuing of new shares is a simple matter. But it is conceived that although by special resolution you may issue new shares, you cannot issue new classes of shares. Thus, if the memorandum fixes the capital at £100,000 divided into 1,000 shares of £100 each—all ordinary shares—the company cannot by special resolution authorise the issue of 20,000 preference shares; though it would be quite lawful to resolve to issue another 20,000 ordinary shares—or, for the matter of that, 120,000.

Consolidating shares is a comparatively simple matter. Suppose you have a capital of £100,000 divided into 100,000 £1 shares, of which 20,000 are issued and are fully paid up. You may resolve that the capital shall be divided into 20,000 of £5 each, so that every holder of a £1 share shall become the holder of a £5 share instead, and thus become liable for another £4 of calls. Or suppose all your 100,000 £1 shares are fully paid up, you can convert them into 20,000 £5 shares fully paid up.

In like manner, a company may **reduce its capital** by a special resolution, with the Court's approval. If the original articles of association do not provide for this, it will first be necessary to pass a special resolution incorporating a new article for the purpose (p. 642). After the new article is passed, a second special resolution may be proposed, carried and confirmed to put the article into effect. Thus, you have a company with a capital of £100,000 divided into 20,000 £5 shares. The articles provide no machinery for reducing capital. It is required to reduce the capital to £20,000.

First, you must make a new article to this effect:—"The directors may, with the sanction of a special resolution of the company previously given in general meeting, reduce its capital to such an extent and in such manner as the company in general meeting may direct." After passing this resolution, you will be able to reduce the capital by another special resolution. You can do it in several ways. (a) Suppose that about 15,000 £5 shares have been issued, upon which £1 per share has been paid. You can direct that each £5 share shall be reduced to a £1 share, and that all the 15,000 upon which £1 has been paid shall be considered fully paid up. (b) Suppose you have issued about 4,000 (not more) £5 shares, fully paid up. You can resolve that the capital shall be reduced from 20,000 to 4,000 £5 shares, thus cancelling all unissued shares after 4,000. (c) Suppose you have issued 4,000 shares (£5), on which £2 10s. has been paid up. You can resolve that for every pound paid a fully paid-up share shall be issued; and for every 10s. paid there shall be issued a £1 share with 10s. paid up; and that the capital shall be £20,000 in £1 shares. (d) Suppose all your capital is fully paid up and that the company has lost £80,000 of it. You can turn every £5 share into a £1 share, and wipe off the £80,000 capital altogether (C.A., 1867, section 9; and C.A., 1877, section 3).



But you cannot reduce your capital by repaying paid-up capital to shareholders, without giving the creditors of the company the right to object. Thus, (e) Suppose you have £100,000 in 20,000 fully paid-up £5 shares, and the company finds that £20,000 is quite enough for its business—the £80,000 lying idle, or being merely invested for safety—there may be a special resolution to repay £4 per share to each member. If the company owes nothing to anybody, nobody can object to this; but if there are any creditors they may be allowed to be heard in opposition to the petition to reduce capital. For every reduction of capital has to be submitted to the Court, and approved, before it can be carried into effect; and if the reduction of capital involves either the diminution of the liability of any shareholder [cases (a), (c)] or the return of capital [case (e)], the Court must be satisfied that every creditor consents, or has been paid, or security is given for his debt. If the directors or officers wilfully conceal the name of a creditor, they are all guilty of a misdemeanour.

The special resolution and order of Court for reduction of capital must be registered at the Joint Stock Companies Office; and the special resolution only takes effect when it is registered.

It is also possible for a company to **subdivide its shares**. There may be a provision in the articles of association providing for this. If there is not, the company must first alter the articles (p. 645) by inserting an article allowing subdivision of the shares, and then pass a special resolution to subdivide. One caution is necessary on the subject of subdivision. Suppose you have a company with 200 £5 shares, paid up to the extent £2 each. You may subdivide the shares into £1 shares; that is, make the capital £1,000 (as before), but consisting of 1,000 £1 shares. What you cannot do is this—you cannot make every holder of a £5 share (£2 paid up) the holder of two fully paid-up shares, and three shares with nothing at all paid up. You must distribute the £2 amongst the five new shares—so that each £1 share has 8s. paid up. That is, the shares as subdivided must bear the same proportionate liability as the shares before subdivision. So that if you are asked to vote for the subdivision of shares in a company of which you are a member, do not run away with the notion that you will, by that alone, get off paying anything. The only advantage of subdivision is to render the shares easier to handle. It is more easy to sell ten £1 shares than one ten-pounder; and the tendency is all in favour of shares of small nominal amount. The £1 share is the rule, the £100 share the exception.

**Alteration of memorandum of association.**—When it is desired to alter the memorandum in the manner set out on page 635, it is necessary for the company to pass a special resolution to that effect before the matter can be brought before the Court [C.A. (Memorandum of Association), 1890, section 1].

The company may also, by special resolution, **render unlimited the liability of the directors, or managers, or managing director**. When the original articles or memorandum of the company provide that the company may make the liability of the directors, etc., unlimited, the article is to be carried into effect by special resolution. When, however, the original articles do not so provide, it will be necessary first to pass a special resolution altering the articles; and then to

pass another carrying the new article into effect. But this course is very rarely followed. Very few men would care to be directors or managers of a company in which the liability of the shareholders was limited to the nominal value of the shares, while they (the directors, etc.) were responsible for all debts without limit (C.A., 1867, section 8).

A special resolution is also necessary before any company can make a **change of name**. The approval of the Board of Trade must be obtained, and the new name registered in place of the old one. Of course, the change of name does not make the least change in liability, any more than I, if I were to change my name from plain, honest Smith to De Courcy-Smythe, should escape payment of my debts (C.A., 1862, section 13).

**Voluntary winding up** (p. 656) also requires a special resolution.

**Alteration of articles of association.**—A company can, by special resolution, alter all or any of its articles, though it cannot, except in the manner and to the extent stated elsewhere, alter its memorandum (pp. 635 and 642-4). The reason for the difference is plain when you consider the great difference between the two documents. The memorandum is the company's charter, setting forth its objects and defining its powers. The articles are merely domestic regulations relating to the internal management of the society—the relations of the shareholders to one another ; the position and powers of the directors ; and so on.

But there are, or may be, **some parts of the articles** so essential in their character as to be **unalterable** by the majority against the will of the minority ; even though that minority consist of only one member. The most familiar instance is that given on another page ; namely, that unless the original articles permit of it, you cannot create preference shares. The reason is that when by the original regulations the shares are all of one class, and all members are to share proportionably in profits, this is such an essential part of the contract of partnership or association between the members that 99,999 shareholders cannot alter it if the hundred-thousandth objects.

**Things that must be dealt with in general meeting.**—I wish you here to notice the difference between “may” and “must.” Generally, the management of the company's affairs is left in the hands of the directorate ; and necessarily so. Some things there are that the directors cannot do. (1) They cannot fix their own remuneration, unless the articles specially say that they are to do so ; but such remuneration must be fixed by the company in general meeting. (2) They cannot entirely of their own authority declare a dividend—unless the articles expressly give them the power. They can only recommend a dividend ; which must be approved by a general meeting. (3) They cannot alter articles or regulations—this must be by special resolution of a general meeting (*see above*). (4) They cannot turn shares into stock (p. 631). This process must have the consent of a general meeting. (5) At every ordinary (annual) general meeting the directors must submit a statement of the year's accounts and business.

The **business of a general meeting** (whether ordinary or extraordinary) is of two kinds ; namely, ordinary and special. *Ordinary business* consists of sanctioning a dividend and the consideration of accounts, balance-sheets and



the ordinary report of the directors. *Special business* is anything else beyond these. The distinction is important, because no notice of the nature of the business to be transacted need be given to shareholders when only ordinary business is to be done; but such notice must be given of special business; and if the notice does not state clearly what is going to be discussed or proposed, no resolution that may be carried will have the slightest legal effect. All the business of an extraordinary meeting is special business.

When a general meeting is held, the first thing to be done is to see if a quorum be present. If not, you must wait for one hour to see if members put in an appearance; and if at the end of that time there is no quorum, you can only do two things, namely, (1) elect a chairman of the meeting, and (2) declare a dividend. You cannot even receive the directors' report or discuss the accounts.

Suppose, after waiting an hour, a quorum is present. Then the chairman takes the chair. The chairman of the board has the right to preside if he be present. If not, you must give him fifteen minutes' grace, and then elect any member present. Suppose you propose our esteemed friend Mr. Jones; somebody seconds him. As an amendment I propose Mr. Brown, and he is seconded. There is no chairman to put the question to the vote, so you, as the mover of the resolution, put the amendment to the meeting first. If it is rejected you then put your resolution. If my amendment is carried as an amendment it must then be put as a resolution; and if it be carried, Mr. Brown takes the chair.

First, the ordinary business should be taken (*see above*) and then any special business of which notice has been given.

**Voting.**—When a proposition is duly put to the meeting, the right of voting comes into question. The company's articles ought to contain the voting rules; but in the absence of anything therein to the contrary the following prevail:—

(a) Every member has one vote for every share up to ten; one for every additional five up to one hundred; and one for every ten beyond the first hundred.

(b) Votes may be given personally or by proxy.

(c) Voting shall be by show of hands unless at least five members demand a poll. Upon a vote by show of hands, a declaration by the chairman that the resolution is carried is final unless he acts fraudulently. The chairman has a second or casting vote in case of a tie. Otherwise it is a case of "one man, one vote."

(d) If a poll is demanded (by at least five members), the chairman is to direct how, when, and where it is to be taken. Unless the articles forbid, it may be taken then and there. It is only on a poll that members vote according to shares. [*See (a) above.*] Here also the chairman has a second or casting vote if there be a tie.

**Proxies.**—A proxy is a member authorised by another member to vote for him. It is interesting to remember that down to the middle of this century members of the House of Lords could give proxies to another member. It is

said that the Duke of Wellington generally carried in his pocket enough proxies to turn any division. The Peers, by resolution, have abolished this right and it is quite open for any company, by its articles, to exclude proxy votes.

The appointment of a proxy must be in writing, signed by the member giving it and witnessed by at least one witness; and this writing must be deposited at the office of the company at least seventy-two hours before the time appointed for the meeting. This is a precaution intended to give the directors time to see whether the authority is a real one. An authority to vote at one meeting (and any adjournment of it) must bear a penny **stamp**. You can also appoint a proxy generally—that is, to vote at all meetings for *twelve months*—but in this case the instrument will require a ten-shilling stamp.

## FORM.

THE GOLDEN GOOSE COMPANY, LIMITED.

Penny  
Stamp.

I, John Jones, of 12, Nihil Street, Chipley, in the County of Middlesex, draper, being a member of the Golden Goose Company, Limited, and entitled to [six] votes, hereby appoint Thomas Smith, of 15, Nihil Street, Chipley aforesaid, grocer, as my proxy to vote for me and on my behalf [\*at the ordinary (or extraordinary) general meeting of the company, to be held on the 10th day of April, 1897, and at any adjournment thereof].

As witness my hand, this [12th] day of [March], 1897.

JOHN JONES.

Signed by the said John Jones in the presence of

WILLIAM BROWN.

Schoolmaster, Chipley.

Any of the above rules may be altered by the articles of the company. (See p. 658, for proxies given to directors.)

The **conduct of the meeting** is in the hands of the chairman and is similar to the conduct of other public meetings. The chairman rules on all points of order; he puts the propositions to the meeting, he counts the hands held up for and against. As a rule, after a resolution is moved, the chairman asks if there is a seconder. I have known a chairman to refuse to allow a motion to be discussed until it is seconded. But this is wrong. There is no need for any resolution to be seconded before it is put to the meeting and voted on; still less before it is discussed. I know this will be news to many readers; for there is a notion abroad that a resolution is not properly before a meeting until it has been seconded. The mistake is a natural one. We are accustomed in the conduct of meetings in Britain to "second" as well as "move" resolutions, and the practice seems to have become stereotyped; but it is not as a rule necessary. Any company can make it a rule (in the articles) that resolutions proposed in general meeting must be seconded; but if no such article is made, a mere proposition is enough. More than that—the chairman can put to the meeting, to be

\* Or, at any meeting of the company that may be held within [12] months from this date. [But this would require a 10s. stamp.]



voted upon, any proposition he pleases, without anyone having formally moved it. When any resolution is adopted, it must be entered in a minute-book and signed by the chairman.

**Adjournments.**—It is for the chairman to say, "This meeting is adjourned until the 30th of September next," but he cannot do so without the consent of the meeting.

An adjourned meeting is part of the original one ; so that it is not necessary to send round notices of the adjourned meeting. For the same reason, no fresh business can be transacted at the adjourned meeting ; but only such matters as were down for discussion at the original meeting and were left unfinished.

**Who may vote?**—The answer to this question must be looked for in the articles of the particular company in question. By the articles of some companies, certain shareholders are not allowed to vote. For instance, I know of one company, with preference and ordinary shares, where the holders of the latter manage everything ; for the preference shareholders have no vote at all. In such a case, of course, the ordinary shareholders cannot pass valid resolutions which would deprive the preference shareholders of their rights—as, for instance, to reduce their interest from 6 to 5 per cent.

I have been asked, "If a share belongs to two persons, who votes in respect of that share?" The answer is : Unless the articles otherwise provide, the one whose name occurs first in the register as one of the holders of that share.

The registered owner of the share or shares is entitled to vote at all meetings, with three exceptions : (1) A lunatic or idiot cannot vote ; but his committee (p. 365) or curator (p. 367) will do so for him. (2) A member whose calls are in arrear cannot vote until he has paid. (3) A transferee is not entitled to vote unless he has held his shares three months before the date of meeting. This does not apply to a meeting held before the company itself is three months old. All these exceptions may be abolished, or mitigated, or extended by the company's articles. But if you find nothing to the contrary there, the above rules will apply. The exception (3) is intended to prevent the buying up of shares just before a meeting, so as to gain voting power for a particular object.

#### IV.—THE POWER OF DIRECTORS AND ITS LIMITATIONS.

The **first directors** are to be appointed by the subscribers of the memorandum of association and until directors are appointed, those subscribers are the directors.

**Remuneration.**—Unless the articles say differently, the directors do not fix their own pay. This is settled by the general meeting ; and it is for the first general meeting to fix the remuneration of the first directors for what they have done previously to that meeting. Directors have occasionally tried to vote themselves a little extra pay for what they have been pleased to consider extra services ; but they must not do this. They must leave it to the general meeting. And even the general meeting cannot do it when they are giving up business. Thus, I read the other day of a company that was being dissolved. It had sold its business at a huge profit and at the meeting called to confirm

the sale, someone proposed that the directors should have a hundred guineas apiece, as a gratuity—a proposition that was carried at once with acclamation. Now, unless there was a power in the articles to do this, the gratuity was illegal; unless, perhaps, every single shareholder assented to it. If there was a minority of one member, holding one £1 share, no gratuity could be given. Not that the directors were undeserving, but no majority has power to give away the money of the minority. If the company had been a continuing one, the gratuity would have been clearly permissible, because it would have been an incentive to future good work for the company. But this company was retiring from business and consequently would not need the directors' further services. And a company, not having a soul, cannot either feel or express gratitude.

**No profits, no pay**, is a very good rule for directors. But unless you have it in your articles, that rule does not apply. In other words, unless the articles *plainly* say that the directors' fees are to be paid out of profits *only*, those fees can be paid out of capital; and the directors can even make a call on the shareholders for the express purpose of paying their own fees. Mark the emphasis I have laid on the words "plainly" and "only" in the last sentence. There was a company once, called the Lundy Granite Company, whose articles provided "that the directors might yearly distribute amongst themselves, as remuneration, such sums as should be equal to one-tenth of the profits of the Company for the last preceding year, provided that there should be yearly distributed among such directors as remuneration a sum which should be not less than £100 yearly for each director." Now the Lundy Granite Company never made any profit. Some companies do not. But the directors had got a good thing and they knew it; for they helped themselves to £100 a year per man out of the company's capital; so that they had not much cause to grumble, even if the shareholders had. This went on for a few years and then the company was wound up. In the course of the winding up, an attempt was made to get back from each director the amount he had been paid out of the company's funds. The attempt was based on the grounds that (1) The article above quoted showed that directors' fees were to come out of profits. This argument failed, because the clause beginning "provided that there should be yearly" clearly qualifies the preceding part of the article. (2) The general law is that directors' fees can only be paid out of profits. This also failed. The Lords Justices held that unless it is agreed to the contrary, directors are entitled to be paid for the time, trouble, skill and experience that they devote to the company's service; and that they have just as much right to be paid as any other persons who render services. Therefore, if the shareholders wish to put their directors on "No profits, no pay," terms, they must alter the articles (p. 645) to that effect.

Further, if the scale of remuneration is fixed by the articles, no extra pay can be given unless you first alter the articles.

The **general powers of directors** are, in a word, to manage the business of the company. Any business which the company has power under its memorandum to do, may be done by the directors without consulting the general body of shareholders, except the matters alluded to on p. 645 and any others mentioned in the articles.



A company, being impersonal, can only act through agents, and the directors are those agents. In one case they were called "managing partners"—a very apt description. The powers of the board, as far as outsiders are concerned, are those of agents. They can make any kind of contract, unless it is a contract beyond the scope of the memorandum of association (*see* *Ashbury Railway Carriage Company v. Riche*, p. 370). They can do anything reasonably necessary for managing the company's affairs. For instance, they may give a bonus to servants in a good year, or grant a pension to the widow of a deceased servant. For it may be, and probably is, to the advantage of the company to treat its servants liberally.

As regards the members of the company, the **directors are trustees**. They must exercise their powers of management, not for their own benefit or personal profit, but for the benefit and profit of the company as a whole; and if they misuse their powers they will be liable to the company in the same way as a trustee is liable if he issues the trust property for his private advantage. For the same reason, a director must act in the company's business with all the carefulness of a careful trustee and with all the skill that he possesses. Of which more anon. At present I wish rather to consider the things that directors may do, than those things that they are forbidden to do. And, first,

**The directors manage the company's business.**—They are, at the same time, only the servants or agents of the general body of shareholders, who can control them in the exercise of their powers. Should a shareholder feel that the directors are going wrong, his plan is to circularise his fellow members; get some of them to requisition the directors to call an extraordinary general meeting, and if the directors refuse let the requisitionists do it (*see* p. 641). The board will disobey the orders of a general meeting at their peril. If they attempt to transgress the law, or to apply the company's money to foreign purposes, any single shareholder can have them restrained by the Court. But so long as the directors do nothing forbidden by the articles, and so long as they do not attempt to do acts which can only be done by a general meeting (p. 645), the details of management are in their hands, subject only to the control of a general meeting.

**Accounts**, both of the stock-in-trade, of all business done, money received and expended, and the credits and liabilities of the company, must be kept by the directors. It is a criminal offence to keep false accounts, for which the director is liable to two years' imprisonment. The like punishment may be meted out to any officer of the company who falsifies the books.

Once a year at least a statement of income and expenditure must be made by the directors. The statement must be full enough to show the sources from which the different items of income arise, and must clearly show the expense of the establishment, salaries, and such-like matters. It is an offence not to make a proper account; and it is the duty of the directors to see that every item of expenditure properly chargeable against the year's income is brought into the account. Sometimes a large sum has to be spent in one year, which may fairly be spread over several years; and in such a case reasons must be stated at the general meeting why the item is spread over more than one year. A printed balance-sheet must be sent to every member seven days before the meeting.

**Auditing and auditors.**—The accounts and books of the company must be audited annually and the auditors are to be appointed by the company in general meeting. But as there may be no general meeting until four months after the company is formed, the first auditors are to be appointed by the directors. It is the duty of the auditors to ask for vouchers of expenditure and to see that they get them. It is also their duty to report to the shareholders whether the balance-sheet is a fair and accurate one. In short, they are appointed to protect the shareholders from possible frauds by the directors and officers.

**Bills and notes.**—Not every company has the power to “accept” bills (p. 456) or “make” promissory notes (p. 457). When it is proposed to form a company of a commercial character, or whose business is such that it may be convenient to use these instruments of commerce, it is always advisable to put such a power in the memorandum. A power in the articles is of no avail.

But even when there is no power in the memorandum, it will be lawful for the company to accept bills and make notes when the business is of a kind which, according to business usage, cannot be carried on without bills. Moreover, in most cases there is a clause at the end of the memorandum authorising the company to do all things “necessary or incidental” to the accomplishment of its main object. It goes without saying that it is necessary or incidental to the business of very many trading companies to draw, accept, or make bills and notes; while in companies not mercantile, it would not often be necessary to deal in these instruments. Thus, it might well be that a limited company formed to carry on a newspaper would have no power to make, accept, or draw notes or bills as “necessary or incidental.”

When the company has such power, it is quite sufficient if the bill, etc., is signed by an agent for and on behalf of the company. The company’s seal need not be affixed (C.A., 1862, section 47). For instance, the following was held to be a bill binding on the Sylhet & Cachar Tea Company, Limited:—

31st January, 1866

At six months after sight of this our first of exchange (second or third of same terms and date being unpaid) pay to the order of ourselves the sum of Two Thousand Pounds sterling, value received.

GORDON STUART & Co.

Secretary and Calcutta managers,  
Sylhet & Cachar Tea Company Limited.

To the Agra & Mastermans Bank, Limited.

It is, however, advisable not to leave the signing of bills, or notes, or cheques in the hands of one man. The best course is to provide, by one of the articles, for the signing by (say) the secretary or the managing director, and the countersigning by one or more of the board.

I have already told you (p. 287) that corporations must, in England, as a rule make their **contracts** under seal. That is, the seal of the corporation must be affixed to the contract ere it is valid. Now, a limited company is a corporation; but in this respect it differs widely from other bodies. The Act under which limited liability companies are formed is the C.A., 1862; and, except as to bills and notes, this statute did not relieve these companies from the liability



of having many of their contracts sealed with the seal of the company. Now, so much formality was soon found to be highly inconvenient to trading companies, and so the C.A., 1867, which was a kind of general patching-up Act, gave relief. By section 37 of the latter statute, the directors and managers of a limited company formed by virtue of the Companies Acts can bind the company by their contracts in almost the same way as your agent or partner can bind you. The section referred to says:—Contracts made on behalf of such a company may be made as required to be in writing, and if made according to English law to be under seal (p. 287), may be made on behalf of the company under the company's common seal. (2) Any contract which, if made by private persons, would require to be in writing and signed by the person to be charged therewith (*e.g.* see Statute of Frauds, pp. 338 *et seq.*), may be made on behalf of the company in writing, and signed by any person acting on the company's behalf (*e.g.* managing director). (3) Any contract which would be good if made by word of mouth between private persons shall be good against a company if entered into by word of mouth by an agent of the company (*e.g.* managing director, or other person in charge).

It sometimes happens that directors or officials of a limited company enter into contracts that they have no authority to enter into and that are not binding on the company. In such cases they will be personally liable to the other contracting party, if their acts amount to a representation that they had such authority as they claimed to have. For instance, Messrs. Kitson and Porter were directors and Mr. Woodward was secretary of the Brentford and Isleworth Tramway Company, which was incorporated under a special Act of Parliament. This statute gave the tramway company no power to accept bills; nor was such a power necessary for its business; but in 1881, the company being in a bad way and being heavily indebted to one Ashdown, its engineer, accepted some bills for the debt due to Ashdown. The acceptance was as follows:—

"Accepted payable at the Blank Bank, Brentford, for and on the behalf of the Brentford and Isleworth Tramway Company.

GEO. KITSON } Directors.  
S. F. PORTER }  
B. WOODWARD, Secretary.

Ashdown indorsed the bill to the West London Commercial Bank; by whom it was duly presented for payment, but was not met. Then the Commercial Bank tried to get the money from the tramway company, but were bowled out on the point that the company had no power to accept bills. Then they "went for" Kitson, Porter and Woodward, and these gentlemen had to pay; although it was admitted that they acted in perfect good faith in signing "for and on behalf of" the company. Mr. (afterwards Lord) Justice A. L. Smith put the case thus: "It seems to me that when they say, 'We accept this bill for and on behalf, etc.,' this is a representation that they have authority to accept the bill for and on behalf of the company."

**Meetings of directors.**—Any director has the power to summon a meeting; but a meeting is not valid unless all members of the board have notice of it. The will of the majority governs, and the chairman has one vote as an ordinary

member and a casting vote if the voting be equal, unless the articles provide otherwise.

#### V.—LIABILITY OF DIRECTORS AND PROMOTERS.

**Things that directors must not do.**—In the first place, as every director is a trustee for the company, he must act upon his independent judgment, and must take steps to inform himself of all those matters necessary to enable him to come to a right conclusion. It generally happens that a man is asked to become the director of a new company by the promoters thereof. And it frequently happens that the promoters have views and interests antagonistic to the interests of the company—that is, of the shareholders. Now, a director must not suffer himself to become a **stalking-horse for the promoters**. He must remember that he is not their agent, but the agent and trustee of the company, and he must look with a critical—even a suspicious—eye upon the promoters' proposals.

It is the commonest thing in the world—for instance, when a company is formed to buy a mine at (say) £100,000—for the directors to conclude the contract without examining it at all. Such a course they adopt at their peril. If I am your agent and trustee to buy property for you, it is my duty to see (1) whether the property is worth buying at all; and (2) whether it is worth buying at the price at which it is offered. And I ought not to conclude the contract unless I am satisfied on both points. This proposition seems to me self-evident. No sane person would spend his own money without inquiry. Therefore no trustee ought to spend trust money without asking what he is buying and what the property is worth. For a trustee must exercise greater caution than would a man who has only his own pocket to consider.

**Shares given by promoters.**—Another very common thing for directors to do is to accept shares from the promoters. For instance, a man who was "something in the City" came to me the other day, and asked me to become a director of a company. I believe it was an honest company, as companies go; but as I did not wish to be a director of it, I refused by saying that I could not afford to purchase the qualifying shares. For by the company's articles every director must hold at least 100 £1 shares—to give him a stake in the concern. "Never mind that," the City man replied, "we will make you a present of them"! I accepted not of the gift. If I had, it would have been a piece of gross misconduct. For how can it be honest that a director should receive from the promoters £100 worth of shares, when it is his duty to preserve the rights and interests of the shareholders in bargaining with those very promoters? And I should have been liable, when my conduct was discovered by the company, to pay for those shares, by way of damages for what is called "misfeasance"—a technical word of French origin, signifying "ill-doing."

**Interest opposed to duty** is a thing abhorred by the law. I have already, in the chapter on agents and agency (p. 539), shown how this state of things is dealt with when an agent is concerned (*see also* p. 330); and when I come to deal with trustees I shall have something more to say. Now, a director is a trustee of his directorial powers, and he will not be allowed to use them



so as to benefit himself at the company's expense. Nay, more than this, he will not be allowed to put himself in a position where his private interests conflict with his duty to the company.

A good example of the stringent rule of the law in this regard is to be found in a Scottish case. Mr. Blair was a director of the Aberdeen Railway Company. He was also a partner in the private firm of Blair & Co. In his capacity of director, he sat at board meetings to consider tenders for certain ironwork required upon the railway. His firm, Blair & Co., tendered for the contract and got it. When all the ironwork had been made and part of it actually delivered to the railway company, some dispute arose and the company refused to accept the rest of the goods. Blair & Co. brought an action in the Court of Session; whereupon the railway company claimed to have the whole contract set aside. Eventually the case went up on appeal to the House of Lords and that august tribunal decided to set aside the contract. It did not matter, their lordships said, whether the contract was a fair one or not. The mere fact that Mr. Blair was a partner in the firm that sold and a director of the company that bought was sufficient to render the contract bad.

The effect of the decision was startling, and very many companies now adopt an article which allows the company to make contracts with a director or a firm of which he is a member. But the article generally provides that the director in question shall not sit at any board meeting when the contract is being discussed or adopted. Even if there is no such article, the decision in the *Aberdeen Railway Company v. Blair* applies and he must not sit.

**Secret profits** are not allowed to a director. This rule is inflexible, and it simply means that a director cannot be allowed to make any profit out of the company other than his ordinary fees. It is by no means an uncommon practice for a director to use his influence to obtain a contract for a friend, receiving a commission or a present from the grateful friend for his trouble. If such a practice is discovered, the director is liable to hand over every penny so received to the company; and the company has also a good case for damages against the grateful friend.

**Dividends can only be paid out of profits.** Profits are the excess of revenue receipts after deducting expenses properly chargeable to revenue account (Buckley on "Companies," p. 512). If a dividend is paid out of capital, the directors are liable to repay the same with interest. Moreover, you cannot authorise payment out of capital, by the articles. Sometimes the directors order the payment of a dividend; or obtain the consent of the general meeting to a dividend on an incomplete account, or without proper investigation. In such a case they are liable to an action by the company, or to proceedings by the liquidator in a winding up. And if the directors cannot prove that the dividend was paid out of profits, they will be ordered to refund the whole amount.

Directors of shady companies are frequently anxious to declare a dividend at an early stage of the company's existence, for the purpose of sending up the market price, so that they may be able to sell their shares for more than they are worth. To this end they borrow money in the company's name and pay the dividend out of that. This is, I need hardly say, quite illegal, and

such directors are liable to repay every farthing to the company. Let me give another warning to directors and shareholders. When the Companies Acts say that dividends shall only be paid out of profits, they mean what they say. Some directors appear to think differently. The Liberator trials disclosed the fact that there are people who set up as business men who think (or profess to think) that if you can show, by some mysterious system of book-keeping, a profit on paper, you can pay a dividend out of that. Such a notion is a malignant heresy. The only profit is a profit in money, and if you have not actually a profit in money, you must wait until you have before you can declare any dividend. Suppose, for example, a limited company buys six shops and houses for £10,000. It receives £400 in rents and pays out £40 in repairs. But the neighbourhood has improved and the property could now be sold for £12,000. Ingenious directors have been known to put down this £2,000 as profit—though it has never been realised—and pay £2,000 away in dividends on the strength of it. The latter end of such ingenious financiers is apt to be troublous. Of course, if the company buys property for £10,000 and sells it for £12,000, that is a profit of £2,000—just as if I buy one East India Stock for £110 and sell it for £113, it is a profit of £3, and my dividend will be £3; making for one year £6. But if I hold the stock instead of selling it, no arithmetic can make my income (or profit) more than £3. To show that this is so, suppose I keep the stock, though the market price has dropped to £107. I receive £3 interest all the same; but according to the ingenious arithmetic aforesaid (if carried to its logical conclusion), my income or revenue profit is nothing. The company-mongers who resort to this kind of accounts do not, however, carry it to its logical conclusion. They only use it to make the profit balance look big.

When directors are about to pay a dividend out of capital or borrowed money, any shareholder can stop them by injunction or inhibition from the Court. But where they have so paid a dividend, an individual shareholder can only bring an action "on behalf of himself and all other shareholders"; or the company (if it be a going concern), or the liquidator (if it is being wound up), must take action against the directors. Each one of the latter is responsible for the whole sum so misapplied; but if one is made to pay the whole amount, he can claim contribution from the others. Moreover, in answer to such a claim, the directors cannot set-off or deduct moneys due to them from the company; and the claim is quite good, even though the directors acted without fraud and merely through ignorance and folly.

The only plea upon which a director will be excused will be that he himself has been deceived, and that the accounts and books of the company have been so manipulated as to prevent him from getting to know the true facts. There are cases in which a director, finding the majority resolved on doing something illegal, refuses to sanction it, protests in a formal manner and leaves the meeting. But this is not enough. He ought to go further. He ought to threaten legal proceedings, and if no notice be taken of his threat, he ought at once to carry it into execution.

Where directors have misappropriated money—as by paying themselves more remuneration than was lawfully due to them, or by making secret profits—



one shareholder can take action in his own name, "on behalf of himself and all other shareholders," to compel such money to be refunded.

**Winding up—Sale of Business—Amalgamation.**—A limited company may at any time give up business and have the company wound up. This is done by a special resolution (p. 642) declaring the intention to be voluntarily wound up and appointing a liquidator. The liquidator then takes charge of the company's assets, realises them to the best advantage, pays creditors, and if there be any surplus he divides it *pro ratâ* amongst the shareholders. Sometimes the sale of a business is a very good arrangement. Thus, of recent years, many companies connected with the cycle industry have sold their businesses lock, stock and barrel, to new companies for a large profit. In one case I know of a company with a capital of £100,000 that sold its business for about five times that sum—so that every holder of a £1 share received about £5 for it.

On the other hand, many companies are voluntarily wound up simply because they cannot go on any longer. The winding up is, in fact, bankruptcy.

Now, it is in the power of the liquidator, if so authorised by a special resolution of the company, to sell the business as a whole for a lump sum to another company. It is a common practice also for the business and assets to be sold to a new company—the consideration being that every shareholder in the old company shall receive certain shares in the new company. In such a case, any creditor of the old company may object and can present a petition to the Court asking for the old company to be wound up by the Court. Moreover, any shareholder may dissent and he can dissent in this way: (1) He can give notice of his dissent to the voluntary liquidator, requiring him either to purchase his (the dissentient's) shares in the old company, or to abstain from the sale to the new company. (2) This notice must be in writing and must be left at the registered office not later than seven days after the passing of the resolution. (3) If the liquidator decides to purchase the dissentient's interest, the price must be fixed by arbitration, unless it can be agreed upon.

Now let me call your attention to a little dodge of the company-monger, by which he turns this part of the Companies Acts to his advantage. We will suppose that a swindling company has been formed—practically from its birth a fraud on the public and the shareholders. The directors are dummies, the company's property is a myth, and no prospectus having been issued it is difficult for an individual shareholder to sue either a director or promoter for damages (pp. 612-4). The only chance of making these gentlemen disgorge is by having them examined before the Court as to their doings and then by asking the Court to find them guilty of "misfeasance." But this can only be done when the company is being wound up by the Court or under the Court's supervision.

When a company is being wound up voluntarily and any shareholder discovers that the conduct of the directors or promoters requires investigation, he may present a petition to the Court asking that the winding up may be either (a) by the Court or (b) under the Court's supervision. I need hardly say that a shareholder taking such a course must satisfy the judge by evidence that some reason exists for interference. It is not good enough to say, "I

suspect this, that, and the other." The complainant must produce a sworn statement by someone who asserts, "I know." Note, please, that in a company which has been wound up voluntarily, the liquidator is bound to call a general meeting of shareholders and present to them an account showing how and with what result the winding up has been conducted. Then the liquidator reports the date and place of the meeting to the Registrar of Companies, and in three months from such registration the company is by law dissolved, after which no more can be done. It frequently happens that in the course of a voluntary liquidation, some shareholder, enraged at the loss of his money, makes investigations and discovers the company to be a swindle, got up exclusively for the benefit of promoters and directors. Then he makes himself unpleasant to those gentlemen by appealing to the Court. So the dodge is for the directors and promoters to stifle inquiry at the outset. The simple way of doing this is by causing the company to be amalgamated with, or transferred to, another company before the swindle is discovered.

I will show you how it is done. Mr. Smart and Mr. Hookfish promote a company to purchase a diamond mine in Africa, which they call the Colney Hatch Diamond Mines, Limited. The vendors sell the mines to the company at the absurdly low figure of £100,000, of which they take only £5,000 in cash and, to show their confidence in the undertaking, accept the rest in shares. By a little rigging of the market, the shares go up and the promoters begin to realise. For reasons explained in a previous passage (pp. 612-14) no prospectus has ever been issued and it is extremely probable that no shares have ever been allotted to any of the public. But by means of touting circulars and other assistance from outside brokers and by dint of diligent puffing in papers calling themselves financial, a demand for the shares is created. When most of the 95,000 vendors' shares have been got rid of, a general meeting is called. The chairman of the board—who is, of course, the promoters' dummy—reads out a favourable report from an engineer or somebody who has made a survey of the company's mines. The assembled shareholders, being mostly fools (or they would never have bought their shares), swallow this yarn with avidity. Soon afterwards a special general meeting is called, at which the members are informed that several more rich mines have been discovered in the immediate neighbourhood of their own; that a new company has been formed to buy the new mines; that the directors have thought that it would be for the shareholders' interests to amalgamate with the new company, so as to lessen cost of production. Finally, the board would like to know whether the idea meets the shareholders' views. Probably not many shareholders will be present; for in companies of this kind a large proportion of the shares is bought by country people and the meeting will almost certainly be held in London. Of those who do attend, some will be creatures of the promoters, others will allow their cupidity to stifle the voice of reason. The amalgamation or transfer is approved of and another extraordinary meeting is called to pass the necessary "special resolution."

The capital of the new company is much larger than that of the old one. Its promoters, the same gang as before, receive a large number of paid-up shares, and each member of the old company is declared to be entitled to a certain



number of shares, wholly or partly paid-up, in the new company. Sometimes, by the contract of transfer, the new company shares can only be obtained by one of the old company members if he applies within a certain time. As soon as the sale is completed, the trick is done. For amongst the things sold to the new company is the right to charge the directors and promoters of the old company with breach of duty. In fact, the transfer to the new company is brought about solely for the purpose of getting rid of the liability of the promoters and directors to refund the money out of which they have swindled the old company members. The only thing to be done is to bring an action to have the transfer rescinded on the ground that it was fraudulent. But in such a proceeding it is very difficult to succeed, because when charges of fraud are made, the Court requires them to be proved up to the hilt. Occasionally you can do this but not often. I daresay you remember how, when Fenimore Cooper's Indians were on the war path, they always took care to leave no trail behind them. They used to walk in the water, or swim, or paddle, whenever they could, on the principle that in water one leaves no footprints. Once in a way these elaborate precautions failed, either through the superior cunning of a brother savage, or by reason of an unlucky accident. So the cunning company-promoter, the modern plunderer, exhibits wonderful acuteness in hiding his trail. You can track him so far, but just as you think you have run him to earth, the trail is suddenly swallowed up and you have had your chase for nothing.

If anyone has so far forgotten the dictates of common sense as to purchase shares in a mine merely upon the recommendation of a financial journal, or has been seduced thereunto by the circular of him who keeps a bucket-shop, my advice is to resist all attempts at voluntary winding up. Should a majority of members overrule you on this score, do your best to get as many fellow members as possible to join you and petition the Court to take up the matter. If the proposal to liquidate voluntarily is accompanied by one to transfer the company's business and assets to another company in exchange for shares, resist this to the uttermost. These rules are not infallible and sometimes are not to be applied. But if you find that the company never issued a prospectus, that it never advertised for applications for shares, that hardly any shares were allotted, except those allotted as fully paid-up, to the vendors, you will be justified in resisting either voluntary winding up, transfer, or amalgamation. And you will probably be repaid for your trouble if you take steps to lay the matter before the Court and so cause the facts to be investigated by the Official Liquidator.

**Proxies given to directors.**—Not infrequently the directors send round, along with the notice of a meeting, a proxy form, filled up with the name of the chairman or some other director. This is suspicious, in many cases, and it leads ignorant people to think that they can only vote by proxy if they send this form. I need hardly say this is a mistake. Personally, I would never give my proxy to the directors. It should be said here that if such forms are sent round, the directors must pay for printing and postage themselves. If they charge the cost to the company they can be compelled to refund out of their own pockets.

**Liability to shareholders personally.**—THE PROSPECTUS.—The liability of directors and promoters to compensate individual shareholders—as distinct from their liability to recoup the company—generally arises on the company's prospectus. Let us first, then, consider who are the people responsible for a prospectus. Here we must consider the subject in two parts: (1) the liability for not disclosing contracts under the Companies Act, section 38 (*see* p. 616); and (2) the liability, under the Directors' Liability Act, for misrepresentations in prospectuses and notices to the public.

(1) As to not disclosing "contracts made by the company, or directors, promoters, or trustees thereof." The **persons liable** under the section are "the promoters, directors and officers of the company *knowingly issuing*" the prospectus or notice. "Knowingly issuing" is of a very strict interpretation. Suppose director Jones knows of a contract made by promoter Smith having some relation to the affairs of the company; but director Jones is advised and believes that this contract is one not included in section 38, and therefore allows the prospectus to be issued without mentioning this contract. We will assume Jones's belief to be honest. Nevertheless he is liable for "knowingly issuing," because "knowingly" issuing means issuing knowing of the existence of the contract. It does not mean knowing that the contracts ought to be disclosed on the prospectus. I have previously shown how section 38 is made, as a rule, of no effect by reason of a waiver clause, by which applicants for shares agree to forego the benefit of section 38 (p. 616). And then people complain that the law is not strict enough!

When, however, you are that *rara avis*, an allottee of shares who did not waive your rights under the section, and you find, after taking shares, that certain contracts made by promoters, etc., previously to the issue of the prospectus were not mentioned therein, what are your rights? Well, your only remedy is personal against the promoters, directors, etc., knowingly issuing the prospectus. And you will recover as damages for fraud the actual amount you have lost through taking the shares. Thus, if those shares were worthless at the time you took them, you can recover all you gave for them. But if they were worth something, then you must deduct the actual value from the amount paid. Thus, if you are induced to apply for ten £1 shares in a totally worthless company, and have paid up the full amount, you will be awarded £10. But if the company was not wholly worthless at the time—say it had property worth about one-fifth of the value it was represented to be—then you will get only £8 (£10 less one-fifth).

(2) The *Directors' Liability Act*, 1890, is now the chief thing upon which one relies in trying to make promoters and directors liable to shareholders individually; and its importance justifies me in giving the history of the events leading up to its enactment. In the year 1887 the case of *Peek v. Derry* came before Mr. Justice Stirling. That case was an action brought by Sir Henry Peek against the directors of a tramway company to recover damages for deceit. The directors had issued a prospectus in which it was stated that the company had the right to use steam power instead of horses—a statement which was, to say the least of it, inaccurate. As a matter of fact, the company



only had the right to use steam power if they could obtain the consent of the Board of Trade. The directors believed that this consent would certainly be given, and that the Board of Trade had only to be asked as a matter of form. Mr. Justice Stirling dismissed the claim, on the ground that the statement was made in a *bonâ-fide* belief that it was true. The Court of Appeal overruled Mr. Justice Stirling, on the ground that a man who makes a positive statement of fact is guilty of deceit if that fact proves to be non-existent. Then the House of Lords upset the decision of the Court of Appeal, and decided that the directors were not liable because they made the statement with an honest belief in its truth. If the directors were not guilty of fraud they were not liable. This decision was given in 1889, and great was the joy in certain circles in London City.

But in 1890 the Directors' Liability Act was passed; and by this Act it was sought to make directors and promoters liable for untrue statements in prospectuses, unless they themselves had been misled. An analysis of the Act shows that liability under it arises as follows:—

(a) When a prospectus or notice inviting subscription for shares, debentures, or debenture stock has been issued.

(b) An untrue statement has been made in the prospectus or notice or in any document sent therewith, or any report, etc., incorporated therein.

The persons liable are: (a) a director at the time of the issue; (b) anyone whose name appears as a director (or as a future director) on the prospectus, etc.; (c) a promoter who has taken part in the preparation of the prospectus, etc., or who has helped to prepare the untrue part; (d) every person who has authorised the issue of the notice or prospectus. All the above are separately liable; but if one is compelled to pay the lot, he may sue the others for a share of it.

*To whom liable?* is the question. Well, to anyone who has "subscribed"—that is, has applied for allotment of shares, debentures, or debenture stock in the company on the faith of the prospectus, etc. Not to one who has purchased shares from an allottee (except as on p. 615). And the liability is to the individual shareholder, not to the company.

*For what liable?* The damages payable are the difference between the price paid for the shares, debentures, or debenture stock, and their actual value. When the company goes to smash it will be the full amount paid, as a rule; for in such a case the shares, etc., have no value. But suppose I subscribe for debentures, and pay £200 for them, and the company becomes insolvent, and I get £100 out of the wreck, I can only claim £100.

*Good excuses* can sometimes be proved by directors and promoters, for the Legislature has not taken up the position that a man shall be liable to pay damages in consequence of his making an untrue statement. As every commercial man knows, one may be asked to become director of an undertaking of which one personally knows little. For instance, I believe one very distinguished Irish Q.C. is a director of Guinness's brewery. Now suppose that I, who am a lawyer, should be asked to be director of a gold-mining company. I am assured, by a person whose word I believe I can rely on, that gold has

been found in paying quantities in the mine. I ask if an engineer or mining expert has been over the ground, and receive an affirmative answer, and am shown the report of a mining engineer. Upon this I become a director. Now, when the prospectus is issued to the public, my duty is to see that statements are not inserted therein beyond the scope of the engineer's report. The best thing to do is to print that report *verbatim* in the prospectus; but if that is not done, I must take care to see that a fair summary is inserted—not a garbled version. Thus, it is dangerous to print isolated sentences or paragraphs, if the context may in any way modify them. More than this—before making statements on the strength of such a report, I ought to satisfy myself that the so-called “expert” really is an expert. I know of a case in which a stock-jobber's clerk, aged twenty-two, who had never seen a mine, was sent out as “resident engineer” to a South African gold mine. This youth sent home the most glowing reports—which had been carefully written up for him before he left London. I believe some twenty or thirty actions were brought against the directors afterwards; but they were settled without going into Court, as soon as the said directors discovered that their “engineer's” identity stood revealed.

To put this concisely, the Statute provides that when the plaintiff (pursuer) has proved the falsity of the statement in the prospectus, the director or promoter is excused if he proves to the satisfaction of the Court:—

(1) With regard to every statement not purporting to be based on an expert's report or on an official document—that he (the director or promoter) believed it to be true *and had reasonable ground for that belief*.

(2) With regard to a statement based on an expert's report, the promoter or director must prove (a) that the statement is a fair summary of the expert's report and (b) that he (the director, etc.) had reasonable ground to believe that the so-called expert was a man competent to give an authoritative opinion.

(3) With regard to a statement based on an official document, the promoter or director must prove that it was a fair and correct summary of the official document. This is to meet such a case as *Peek v. Derry* (p. 659). Had that case happened since the Statute the directors would all have been held responsible for the untrue statement in the prospectus, on the ground that it was not a correct representation of an official document, even though they (the directors) believed it to be correct.

(4) It may happen that, after consenting to become a director, and after having agreed to issue a prospectus, you find out that certain parts of the prospectus are false and misleading. What ought you to do? Let me say at once that if the prospectus has gone forth to the public, you will be liable to those who subscribe for shares on the strength of it (subject to excuses 1, 2 and 3). But you ought to try to stop the issue of the prospectus. If you do not, your position is that you allow the prospectus to go forth bearing your name and containing a statement which you know to be untrue. Therefore, I say, stop the issue of the prospectus at any price. Write to the secretary at the company's registered office and to the chairman, withdrawing your consent to be a director. Nay, even go to the printer and order him not to proceed with the printing. You may do all you can



to prevent the prospectus from appearing with your name on it as a director and yet be liable. Take this case: You have consented to be a director and the prospectus has been printed with your name on it, but not issued. You withdraw your consent. Nevertheless, the prospectus is sent out and advertised as originally printed. As soon as you know it you ought at once to give adequate public notice that the prospectus or advertisement was issued without your knowledge or consent. Such public notice ought, I think, to include at least one advertisement in every paper in which the prospectus was advertised and an advertisement, at all events, in one or two London and one or two leading provincial dailies.

"But," says one of my Scottish readers, "bang goes saxepe." In other words, these advertisements cost money. So they do. But be comforted. You can recover in any Court the expense you have been put to from the people that issued the prospectus.

To avoid the operation of this most salutary Act of Parliament, the dodge has been not to issue a prospectus, but to float the company and then try to sell the shares to the public by means of puffs in newspapers and such circulars as I have shown on pages 612-13. If you can trace a **conspiracy amongst promoters** to unload worthless shares on the market by means of puffs and circulars, and can prove that you took shares in the company on the faith of such a puff or circular, you can always recover compensation from any one or all of the conspirators. You will have to prove that the defender knew the puff to be a lie and that he intended to defraud, which makes it much more difficult to succeed than in an action on a prospectus under the Act of 1890. But in this case it does not matter whether you are an original allottee or a purchaser of shares, provided you can satisfy a jury that the puff was intended to induce you (amongst others) to apply for or buy the shares. And it is not very difficult to persuade a jury to draw this inference when the puff is evidently a fraudulent lie.

## CHAPTER VI.

### THE SHOPKEEPER

**Taking a shop**—Building restrictions—Buildings not to be used for trade—Covenants against offensive trades—Shopkeeper's fixtures—Buying a business—Necessary precaution—Goodwill does not include right to exclude old shopkeeper from trading—Unscrupulous rivals—The Oxford tailors—No right to trade so as to deceive public—Sale of goods—When written order necessary—Never in Scotland—Price—How much when no bargain has been made—Sale of non-existent goods—Seller's title to goods—Market overt—Quality and fitness of goods—Goods ordered for a special purpose—Goods bought by description—Express warranty of quality—Goods "on approval"—Must be approved or rejected in reasonable time—Delivery, what?—Payment, when?—Credit—Buyer may examine the goods and reject if not suitable—Grumbling is not rejection—Seller's remedy—When buyer will not take delivery—When he will not pay—Buyer's remedy when seller will not deliver—"The shopkeeper's bugbear"—Married women—Infants—How to recover small debts in the County Court—SHOP ASSISTANTS—Fines—Deductions from wages—Can only be by contract—Notice to be posted up—Fine to be fair and reasonable—Hours of employment—"Young persons employed in shops"—Assistants partly employed in a workshop—Dressmakers' assistants—"Shops" within the meaning of the Shop Hours Act—Local inspectors—Notice of hours to be posted up—Conspicuous place—Shopkeeper may escape liability by showing that he is not to blame—Foreman, etc., may be liable instead—Receipts for money paid.

**Taking a shop.**—When a man begins shopkeeping, he either buys a piece of ground and builds a shop for himself, or buys land with a shop already erected thereon; or buys land with a private house on it and turns it into a shop; or else he simply takes a place on lease. The careful and prudent man about to buy or take on lease landed property, will ask a solicitor to prepare the necessary deeds. But it often happens that you see a chance to make a bargain at a time when you cannot go to your solicitor. Brown says to you, "Do you want to buy a piece of ground? I can sell you my plot at the bottom of Side Street for £250." And if you ask for time in which to consult your lawyer, Brown will perhaps say, "Take it or leave it. It is yours now if you'll have it, provided you pay me ten per cent. deposit down on the nail." Now suppose you clinch the bargain and write out a contract then and there and sign it, to the effect that Brown agrees to sell and Juggins agrees to buy Brown's plot of land situate between Numbers 12 and 16, Side Street, at the price of £250, of which Juggins pays £25 as deposit, the balance to be paid on the completion of the purchase. This is simple enough and seems right enough; but it is not at all unlikely that after you have paid your £25, your lawyer, on examining Brown's title-deeds, may find that they contain a clause



prohibiting Brown and his successors from building any other than a private house on the land.

Therefore, before you agree to buy land for the purpose of erecting a shop on it, be careful to ask the seller whether there are any building restrictions. And if he says "Yes," ask what they are—especially ask whether there is any covenant, or condition, or other clause in the title-deeds prohibiting the buildings on the land being used for a shop. Should the seller assure you that no such restriction exists, you may safely make your bargain and pay your deposit; for if he should turn out to be wrong, the bargain is off, and you can get your deposit back.

The like observations apply to the case of a lease. You may feel safe enough in buying or taking a lease of a place that has already been used as a shop, even if you discover afterwards that the deeds prohibit such use. The reason is that such prohibitive clauses as this are not regarded with the greatest of favour by the Courts; and if the person who could have stopped it allows the occupier to set up shop and acquiesces for some little time, such delay and acquiescence will deprive him of his right to interfere. (*See also* p. 199.)

**Covenants against offensive trades.**—As I have shown elsewhere, in neighbourhoods called "residential" it is the practice of landowners to insist on everyone who buys or leases a plot of land covenanting that the land or any building thereon shall not be used for purposes of business or trade. Landlords in districts not purely residential, but where the houses are occupied by people other than the working classes, frequently insist on a modified clause to this effect: "The purchaser [or lessee] shall not use the land or any building thereon for any offensive, noisy, or dangerous trade, business, pursuit, or occupation, or any purpose which shall or may be or grow to be a nuisance, damage, grievance, or annoyance to [the landlord] his heirs and assigns, or to their tenants, or to the owners or tenants of any adjoining property."

In the chapter on the Householder and his Neighbour (p. 180) I have told you of various offensive trades that are or may be nuisances at Common Law—such as a fried-fish shop. But the clause above alluded to—now common in leases and purchase deeds of shops in good neighbourhoods—is much wider than the Common Law. It prevents the occupier of the premises from doing many things and carrying on many trades that would not be nuisances, but which are or may be "damage, grievance, or annoyance" to the man next door or across the way. For instance, a Doctor Benham started "the Queen's Jubilee Hospital" in Gloucester Terrace. It was held that this was an act "which shall or may be or grow to be a nuisance, damage, grievance, or annoyance" to the neighbourhood, because crowds of out-patients of the poorest class, many of them having infectious diseases, would resort to the hospital and so put the residents of Gloucester Terrace in fear of infection.

Under the same kind of clause, shopkeepers have ere now been restrained by the Court from exhibiting in their windows articles calculated to attract large crowds. For such crowds, especially of the baser sort, would undoubtedly be an annoyance, if not a nuisance at Common Law. A public-house might

easily be considered an annoyance, especially in a genteel neighbourhood. And an application was made in January, 1897—with good reason, I think—to Mr. Justice Stirling, asking him to stop a fat-woman show. Before the application could be heard, the occupier of the shop got rid of his obese ladies and introduced a tattooed person of the other sex. Neither the women nor the man were exhibited in the window; but, owing to the crowds of people of the rougher sort who used to congregate round the door, waiting for admission, very little doubt was felt in holding the show to be a “grievance or annoyance” to the neighbours.

**Fixtures.**—Having taken your shop, your tenancy is, on the whole, like that of the tenant of a house (*see* Book II.). But in one important respect your positions differ, to the material advantage of the shopkeeper, and that is in the matter of fixtures. I have shown how, by the law, both of England and Scotland, the tenant of a house who affixes anything to the house is bound to leave it there, unless the fixture is one purely for ornament or convenience, and is not so firmly fixed as to cause damage to the structure if it should be removed. This law was based on the maxim that whatever is fixed to the soil is part of the soil—a doctrine evolved by the old Roman lawyers out of the philosophic notion that the less important is accessory to the more important. Therefore, if I nail a bookcase to the wall by so many long nails that the bookcase cannot be removed without damaging the wall, I am not allowed to take away the bookcase at all, because the bookcase is only an accessory to the wall, and you must not damage the principal to save the accessory.

But in the law of the United Kingdom this law has been relaxed in favour of trade. It is a general rule that a tenant may remove, during or at the end of his tenancy, all fixtures put up by him for the purposes of his trade, but subject to the rule that the principal—*i.e.* the shop and buildings—must not be destroyed for the sake of the accessory. So that a shopkeeper may remove shelves, show-cases, and such machinery as he uses for trade purposes, however firmly affixed to the premises—whether nailed or even built in—provided that he has not to destroy any considerable part of the shop to do it. In the case of a shopkeeper it would hardly ever happen that fixtures could not be removed without pulling the premises down. This question arises more in the case of manufacturers, and I will deal with it in Chapter vii. of this book. But I would point out, simply, that the shopkeeper is allowed far more latitude in the removal of trade fixtures than is the private householder in the removal of domestic fixtures. The householder must not knock the premises about to remove fixtures. The shopkeeper may, provided that he do no irreparable or serious damage. Of course, any damage done in removing the fixtures must be paid for, and the shopkeeper must remove his fixtures before or at the same time that he quits the shop. Anything that is left fixed to the wall after the tenancy is up and possession yielded to the landlord becomes part of the shop itself, and therefore part of the landlord's property (p. 174).

**Buying a business** is a thing you ought to be careful about. Especially



cautious should you be about purchasing in response to one of those tempting advertisements that appear in the newspapers:—"For sale, a grocery business in growing suburb. Stock and fixtures at a valuation. Goodwill, £100. Turn-over, £80 weekly. Good reasons for leaving." Now such an advertisement may be, and often is, genuine; but too often it is merely the first move in the game of the wily swindler who makes it his business to start shops merely in order to sell the goodwill—a swindler whose little ways and habits are portrayed elsewhere (pp. 272, 273).

Another very **necessary precaution** to take in buying a business, with the goodwill thereof, is to make the seller agree not to set up within a certain area, and not to solicit or accept orders from the customers of the old business. As I have shown on page 314 *et seqq.*, a contract by which a man agrees not to carry on business is said to be in restraint of trade, and will not be enforced by the Courts unless it is reasonable. Let me repeat here that an unreasonable restriction is one that attempts to stop a man from carrying on the business in question in a way more than reasonably necessary for the protection of the person who has bought the goodwill. Thus, if you buy a retail drapery business in Birmingham, it would be reasonable for the seller to agree not to carry on that trade within ten miles of his old shop; but a hundred miles would probably be held to be unreasonable.

I have had it said to me more than once, "Do you mean to tell me that if I buy Jones's business and goodwill, he can set up a shop on the other side of the street and serve the old customers?" The answer is, "Yes. Unless he has expressly agreed not to do so." But I will tell you what he must not do. He must not personally solicit an old customer, nor send him a letter or circular asking for his custom. He must not ask any old customer not to deal at the old shop. Still less must he represent that he is carrying on the old business, or that his new shop is a continuation of the old one. But there is nothing to prevent him from publicly advertising that he carries on the business of (say) a draper. Thus an advertisement, "William Jones, Draper, has a choice assortment, etc. . . . 20, High Street, Peddlington," would be legal enough. But "William Jones, Draper, 20, High Street, removed from 12, Low Street," would be wrong; and the purchaser of the 12, Low Street business could stop Mr. Jones from repeating the advertisement, besides getting compensation. This was decided in an action of *Labouchere v. Dawson*.

**Unscrupulous Rivals.**—The law of the United Kingdom has always discouraged monopoly and encouraged trade competition. This it does in the public interest. But there is a point where rivalry ceases and dishonesty begins, and that point is when the man at the opposition shop tries to mislead the public into dealing with him when they suppose themselves to be dealing with me. It is not at all uncommon, when one man has built up a trade and established a good name, for some other man to set up shop in the same street, paint over his door a name similar to that of the old-established tradesman, dress his window in the same style, and generally try to mislead the unwary into the belief that his is the old shop.

Such was the case of Mr. S. Pottage, whose fate I will now relate. The

said Pottage was a tailor of Oxford, and had been foreman in the establishment of one Hookham, a very well-known artist in waistcoats, whose shop was once the haunt of the undergrad. whose soul was set on the adornment of his vain person. So diligent in business was Pottage, that Hookham took him into partnership, and for a short time they ran in double harness as "Hookham & Pottage." But an old saw has it that a good servant may be a bad partner—or words to that effect—and so Hookham found. Before long disputes arose. A lawsuit and a dissolution of the firm followed, and Hookham was allowed to keep the old shop. Then Pottage took a place only seven doors away. Hookham had over his shop in gold letters on a dark-green ground the legend, "Hookham & Co." Pottage caused to be painted up: "S. Pottage, late of Hookham & Pottage," also in letters of gold on a dark-green ground. The words, "late of," were in small letters. Moreover, the words were so painted that "Hookham" appeared over the shop door. The consequence was, that two gentleman who had been recommended to try the garments of Hookham strolled into the shop of Pottage, thinking it to be Hookham's. Also a little girl who had been sent with a message to Hookham's delivered that message to Pottage. Wherefore Hookham invoked the aid of the law. And Pottage answered, "I am only trading under my own name, and informing the public (which is perfectly true) that I was formerly get-up with Hookham." But Vice-Chancellor Malins being of opinion that the general get-up of Mr. Pottage's shop front was calculated to deceive undergraduates and others who were looking for Hookham's, ordered him to alter the name-display so as to remove the deceptive part thereof.

There was a similar sort of case where one Smith, a former assistant of Thresher & Glenny in the Strand, set up a shop in Oxford Street. He painted up, "Smith, late with Thresher & Glenny, Strand." "Smith" and "late with" were in small letters, but "Thresher & Glenny" stood out prominently. Moreover, Mr. Smith had a roller-blind with the same legend painted thereon, and on sunny days he would let down the blind a little way, displaying only "Thresher & Glenny, Strand," the "Smith, late with" being on the part of the blind that was rolled up. Messrs. Thresher & Glenny took action, and the Court ordered Mr. Smith to amend his ways. The ground here, as before, was that Smith's method of painting up his name was calculated to make people believe that his shop was Thresher & Glenny's—or at least a branch business.

No judge will lightly prohibit a man from trading in his own name; but he will if the name is used in such a way as to be calculated to deceive. For instance, a brother of Holloway—the man of pills and ointment—set up shop and offered for sale, "H. Holloway's pills and ointment." H. Holloway's pill-boxes, etc., were very like the original Holloway's, and so the Court ordered H. Holloway to stop trading on his brother's name; though I think nothing would have been said had H. Holloway made up his wares in wrappers strikingly unlike his brother's. For, of course, the original Holloway had no legal monopoly of the name of Holloway, nor of the sale of pills and ointment.

But when a man uses a name not his own, the judge will be more ready



to stop him. Not that the original trader has any right to the exclusive use of his own name, nor because the new man has no right to trade in any name not his own, but because the adoption of the same name as the original trader is strong evidence of a fraudulent intent. Thus, if I have a draper's shop at 12, High Street, under the name of Stiles & Co., and after I have been established some time you come and set up a similar shop at Number 52, and paint up "Styles & Co." (your real name being Dusker), you will have a hard job to persuade a judge that you did not intend to pretend that your shop was mine. The whole essence of these cases is, "Is the new man's act calculated to mislead the public?"

The **sale of goods** is one of the subjects that has been dealt with by Parliament in a codifying Act. The Sale of Goods Act (1893) is a curiosity in its way. It had been drafted and run through the Committee on Law in 1893, under the above title; but for some reason or other it was not passed until February, 1894. So that the Sale of Goods Act (1893) is really an Act of the year 1894. I found this out by a painful process. Wishing to consult a section of the Statute, I sought for it in the Authorised Statutes for 1893, but in vain. Then I looked up another edition of the Statutes for that year. Still in vain. Just as I had made up my mind to write to her Majesty's printers on the subject, it struck me that I would look at the Statutes for 1894, and there I found the Act.

So far as I know, the Sale of Goods Act makes only slight alteration in the English and Irish law, and very little in the law of Scotland. That little was merely in the way of making the Scots law identical with that of the other parts of the United Kingdom.

A **written order**, or some other evidence in writing, signed by the customer, is necessary before you can sue that customer in England or Ireland on a contract for the sale of goods of the price of £10 and upwards, unless the whole or part of the goods has been **delivered to and accepted** by the customer, or the customer has paid **something on account** of the price. This something on account need not be at all substantial. It may be merely a trifle given in earnest, "to bind the bargain," as it is called.

The way the Act works out in the case of a shopkeeper is this: Suppose a lady orders a dressmaker to make a dress at the price of £10 10s. The dressmaker does so, but when she sends the dress home the lady refuses to accept delivery. The order was verbal. There has been no correspondence, so that the dressmaker cannot produce any letter from her customer relating to the order. Nothing has been paid on account. The dressmaker cannot bring her action, because she has not the necessary written evidence to support her claim. I have supposed a case in which the *modiste* not only makes the dress, but supplies the material. If the customer supplies the material, and the dressmaker is to be paid £10 10s. for the making, it is another matter. In the latter instance the claim will be for work done. In the former it is for goods supplied. For if I order you to make a coat for me, you to supply the cloth, my order is for goods—a completed article—to be sold by you to me. But it is easily seen that if you only supply the labour your claim cannot

be for goods sold, because the cloth, the substance of the goods, was always mine.

You would hardly think it possible, I dare say, for people to quarrel about the meaning of the words "a contract for the sale of goods of the price of £10 and upwards." Yet a very pretty little point arose once upon those words. A Mr. Parker, in the year 1820 or thereabouts, went into the shop of Mr. Linendraper Baldey, and there selected a number of articles. Each of the articles was priced separately, and no one of them was marked at so much as £10. "Now," said the customer, "send to my house a list of the things I have bought, with the prices opposite each. I intend to pay cash, so I suppose you will allow me a liberal discount?" "Certainly, sir," responded the obliging linendraper; and he accordingly forwarded the bill, amounting to about £70 in all, and deducted 5 per cent. discount. This was not enough for Mr. Parker. How much he expected I am sure I don't know. But he quarrelled with 5 per cent., and, what is more, refused to accept the goods when they were sent to his house. Whereupon Baldey sued him. Now, the lawyer of the bold linendraper foresaw a difficulty. There was no written order, no acceptance of any of the goods, no part payment. Wherefore the astute one put his case this way:—He did not say, "We claim £70 for goods sold, or damages for breach of a contract for sale of £70 worth of goods." He said, "We claim damages for breach of a contract for sale of one piece of silk at £9 10s.; also damages for breach of another contract for sale of a dozen shirts at £5 the dozen," and so on, as if each article had formed the subject of a separate contract. He hoped to evade the statute by not suing on any one contract where the goods were of the price of £10 or more. But his scheme fell through, I regret to say, and Mr. Parker got out of his bargain. And thus it was decided that when the total price of the goods bought at one time comes to £10 or more, the bargain is within the words quoted—that is, it is a "contract for the sale of goods of the price of £10 and upwards."

There is one apparent exception: in the case of sales by auction. If you bid for three different "lots" at an auction, and are successful in each case, each "lot" forms a separate subject-matter. You cannot lump the three together and call them one bargain.

And in Scotland a contract for sale of goods is enforceable even if made by word of mouth.

The **price of goods sold** may either be fixed at the time of the contract, or may be left to be fixed in a manner thereby agreed. For instance, when a fine-art dealer sells a valuable print, he and the customer may agree to leave the price to be fixed by some well-known connoisseur, or by a valuer. Suppose the valuer refuses to fix a price. Then the agreement is off, unless the goods have been delivered to and appropriated by the customer, when he must pay what is reasonable. Price may also be determined by the method of dealing between the parties. Thus, I for a long time have been in the habit of dealing with my tailor upon the terms of so much for trousers, so much for a frock-coat, and so on. The last frock-coat that I ordered was ordered without a word being said on either side as to price. The result is that we are supposed



to be dealing at the former prices. If no price is agreed on, and there are no former dealings to act on, the customer is bound to pay a reasonable price—no more, no less.

I have sometimes heard people say, in complaining of **excessive prices**, "He [the shopkeeper] has sent in a bill for £5. A most exorbitant charge! But it is my own fault for not making a bargain at the time, and I suppose I shall have to pay." This is a fallacy. If the five pounds is really exorbitant, you need not pay it. You should go to the shop and offer what you think to be a proper amount. It will not do merely to complain of the excessive charge. Still less will it do to take no notice at all until the shopkeeper brings an action, and then plead that the price is excessive. If the shopkeeper brings his action for the £5, pay into Court what you say is the proper charge, and defend as to the balance. In considering what is a proper charge, you must take into account the usual prices charged in that trade and in that class of shop. For instance, it is quite reasonable for a shopkeeper in Bond Street to charge more for the same article than one in the Seven Dials. Nor can a Glaswegian reasonably expect to be charged at the same rate in Sauchiehall Street and the Sautmarket.

**Sale of goods that have perished.**—If you contract to sell specific goods, and at the time of the sale the goods have perished, the contract is void. And so, also, if the goods agreed to be sold perish without fault on either side, after the agreement for sale and before the risk passes to the buyer. For instance, you have two furniture shops. In one of them is a Chippendale table which Jones has seen. On Monday at half-past ten in the morning he comes to the other shop and offers you ten pounds for the table, which you accept. But a fire had broken out in the first shop at ten o'clock, and the table was destroyed at the time you made the bargain. There is no contract, and you must return Jones's money. Again, suppose the fire breaks out at eleven o'clock, there is no contract unless the negligence of you or your servants caused the fire. In the latter case, you must pay damages.

**The seller's title** to the goods may come in question. For example, the seller may have stolen the goods—or he may have bought them from a thief. Or they may belong to someone other than the seller. I daresay you remember, many of you, the Pink Pearl case, where a young lady stole jewels from a friend and sold them to Spink & Co., jewellers. Now Spink & Co. did not acquire any title to those jewels, because no one\* can sell more than he has got. In other words, the thief, having no title to the pearls, could not give a title to Spink & Co. Neither could Spink & Co. have given a title to anyone to whom they had purported to sell. In England and Ireland there is one exception to this, namely—

**Sales in open market.** For the law is that a sale in open market gives the buyer a good title to the goods, if he bought in good faith. What is open market—or "market overt," as lawyers call it? Well, it only includes old customary markets—not markets made by a local Act of Parliament. And it does not apply to shops, except shops in the City of London. A *bond-fide*

\* Except Factors. See Book III., Chap. iii., sect. v.

sale in a City of London shop is a sale in open market, provided that the whole transaction is done in the shop to which the public have access—that is, not in a private room or place of that kind.

But where goods have been stolen, and the thief is prosecuted to conviction, the goods re-vest in the true owner at the time they were stolen, even though they may have been dealt with in the meantime in open market. This paragraph only applies to goods stolen: not to goods obtained by fraud, or false pretences, or embezzlement by a clerk or servant; nor does this law apply to Scotland.

In the whole of the United Kingdom, also, the seller is understood to contract that the goods are free from any incumbrance or charge not declared or known to the buyer before or at the time of the contract. For example—Jones pawns a watch at Mr. Bezant's, the pawnbroker's. As you may be aware, Jones has six months in which to redeem the watch: the six months counting from the last payment of interest on the loan. If Bezant sells the watch to Smith before the pledge is forfeited, Jones can make Smith give up the property on payment to him (Smith) of the amount that would have been payable to Bezant. Smith can then take action against Bezant for the difference between the value of the watch and the amount as paid by Jones. [S. of G. Act, 1893, sect. 12 (3).]

**The quality and fitness of the goods.**—The rule of law is, "*Caveat emptor*"—which, being interpreted, means, "Let the buyer look out for himself." But to this rule there are some exceptions which are so wide in their operation that one is reminded of John Bright's famous comparison of the party opposite to a Skye terrier: "You cannot tell which is the head and which is the tail." And with regard to the rule of *caveat emptor* and the exceptions thereto, at first sight one would be inclined to think that the exceptions were the rule, and the rule was the exception. Let me give these exceptions in their order:—

(a) Where the buyer makes known the particular purpose for which the goods are required, so as to show that he relies on the seller's skill or judgment, and the goods are of a description which it is the seller's business to supply, there is an implied condition that the goods shall be reasonably fit for such purpose. Except that a thing sold under its patent or trade name is not warranted to be fit for any particular purpose.

For example, Brown goes to a furrier and asks to be shown some fur overcoats. Says Brown, "I am in the habit of travelling a great deal by rail, and I want a coat lined with some kind of fur that will stand knocking about. I do not know anything about fur myself." The furrier shows Brown some coats, one of which he selects. But very soon Brown finds the fur all wearing out. He has the right to sue the furrier for damages. But if Brown, on entering the shop, says, "I want an electric seal coat," and some are shown to him, and he selects one, agreeing to pay £10 for it, and it turns out to be of a bad quality, Brown has no cause of action against the furrier. Why not? Because he asked for an electric seal [trade name], and he got it.

(b) Where goods are bought by description from a shopkeeper who deals



in goods of that description, there is an implied condition that the goods supplied shall be of a merchantable quality. Here, if the buyer has examined the goods, he takes all risks, except such defects as he might not discover by examination. There was a case of a man who supplied a carriage-pole. The pole had a flaw in it—a defect not discoverable on examination, because, I believe, it was painted over. Neither buyer nor seller knew of the flaw. It was decided that the seller was liable to make compensation because the flaw rendered the carriage-pole unmerchantable. It is not always easy to apply this rule to goods sold in shops. Before the Sale of Goods Act, it was decided that a man who bought meat had no guarantee that it was fit for human food. He could, of course, institute proceedings in the police court; but he could not get his money back. But I think the Act alters this; because clearly the meat is “not of a merchantable quality” if it is unfit for human food.

(c) There may also be a warranty or condition of quality or fitness for a particular purpose by the usage of trade. I know of no case where this would apply to retail sales.

(d) Last of all, there may be an express condition or warranty of quality or fitness. I mean that if a shopkeeper expressly agrees that the goods sold are of a certain quality, he will be liable to have the goods returned on his hands, or to have an action brought for damages if they are not of such a quality. It is necessary to distinguish between a warranty of quality and a mere puff, for no one is obliged to cry stinking fish; and no tradesman can be made liable simply because he over-eulogises his wares. Take a case. I go into a cutlery shop to buy a razor. I ask, “Is this good steel?” and the salesman replies in the affirmative. I buy the razor, and it proves to be a poor one. I have no remedy. But if I ask, “Is this Sheffield make?” and am answered affirmatively, and the razor turns out to have been made in Germany, I can return it and get my money back, or keep the razor and sue for the difference in value.

*Sale by sample* (see *The Law of the Merchant*, Book III., Chapter viii.).

The effect of the contract of sale varies according as the agreement relates to specific or unascertained goods. By “specific goods” I mean a contract like this: “Jones agrees to sell and Smith to buy this piano at the price of £25.” The effect of this contract is that the piano becomes the property of Smith as soon as the contract is made. By “unascertained goods” I mean a contract—e.g. to sell and buy 10 lbs. of sugar—no particular 10 lbs., but just 10 lbs., to be afterwards weighed out. In such a case the sugar becomes the property of the buyer as soon as it is weighed and set on one side. It is hardly necessary to discuss this matter here at any length, as it is of importance, as a rule, only in wholesale contracts (see Chapter viii.).

Goods on “approval” become the property of the buyer, and he must pay the price when he signifies his approval to the seller, or does something to show that he intends to keep the articles. I had the following case before me the other day:—Purl & Co., retail jewellers, were asked by a certain noble lord to send to his house, “on approval,” a diamond aigrette, a snake bangle, and a few other articles of jewellery, value about £400. The goods were sent,

without any time being mentioned for the approval to be signified. In three weeks, having heard nothing, Purl & Co. wrote asking for their money or their goods. No answer. In about a month they wrote again, and their letter was again ignored. In fact, the jewels were detained for three months without either approval or rejection being signified. Then I was consulted, and I advised that under the Sale of Goods Act (section 18, rule 4, *b*) the noble lord had accepted the goods, and was bound to pay for them. Accordingly Purl & Co. sent in their bill; and though the customer then wanted to return the jewels, the tradesman would not take them, and ultimately, I believe, recovered the price. For if no time is fixed, the customer is deemed to have approved the goods after the expiration of a reasonable time. What is "reasonable" depends on the facts of each case.

**"Send on the parcel."**—It is the seller's duty to deliver the goods. Do not imagine me to intend to say that it is the shopkeeper's duty to deliver the goods at the customer's house. It is only his duty to send the goods to the customer if (*a*) there is a contract so to do, or (*b*) if by the usual course of business it is an implied condition or understanding that the tradesman shall send the goods. Otherwise it is the duty of the customer to take away the goods; and no customer can refuse to carry out the bargain if the tradesman refuses to send on the parcel. I heard an amusing instance of this in a West End shop one day. Madame had chosen some millinery goods—so many yards—which had been duly measured and cut off. Then she took out her purse, paid, and said: "Will you send the parcel to-day?" "Where?" inquired the salesman. "To South Croydon," was the reply. And when the salesman, not unnaturally, refused to send the parcel about twelve miles unless the lady paid carriage, madame demanded her money back. And she got it! But she had no right to it by law, because (*a*) when she said "I will take so many yards," there was a complete agreement; (*b*) when the silk was cut off the piece it became madame's own property; and (*c*) it was clearly her duty to pay and carry her own stuff away with her.

When, however, the shopkeeper agrees to send the parcel, he must send it within a reasonable time and at a reasonable hour.

**Payment and delivery are concurrent conditions**—that is to say, the seller is liable to deliver them whenever they are demanded on payment of the price, but the buyer has no right to possession till he pays (*see* p. 392). It is not absolutely necessary for the seller to prove that he offered the goods to the buyer, if he can show that he was ready and willing to deliver.

**Credit** is always a matter of agreement—that is, unless you agree to the contrary, sales are always for cash on delivery. But if you agree to give credit, you must deliver the goods at once and wait for the money until the agreed time of credit has expired. To this rule there is one exception—namely, that, before you have parted with possession of your goods, or while they are in the hands of a carrier on the way to the customer, you can stop delivery if the customer is insolvent.

**The buyer's right to examine the goods** is insisted upon by the Sale of Goods Act. "If I go to a shop for an article I have previously ordered," said



Lord Bramwell, "and it is delivered to me wrapped up, though I cannot see what it is, there cannot be the slightest question that I have received and accepted the goods, if they turn out to be in conformity with the order. Yet nobody can say that I shall not have a right to object to them afterwards if they are not in conformity with the contract." So when goods are ordered from a shop, and the shopkeeper sends them home, and they are delivered wrapped up, and the messenger does not wait to give an opportunity for examination, it does not lie in the mouth of the shopkeeper to say to the customer, "You took the goods in, and you must keep them."

**Rejected goods** are a frequent bone of contention. I have often heard cases in county courts of this kind:—Blanx orders a coat, to measure, from Sizzers. When the garment is sent home it does not fit, as Blanx finds when he tries it on. Wherefore Blanx throws the coat on one side and, when the price is demanded, refuses to pay. Blanx invariably loses. Why? Because, though he had every right to reject the ill-fitting coat, he ought to have intimated the fact of rejection to Sizzers by word, or writing, or act. I have also heard cases in which Blanx has written intimating that he will not accept or pay for the coat, but has not returned it to the tailor. The tailor then claims the price, on the ground that the coat was not returned. Here the tailor loses. Why? Because, if the coat is rightly rejected, it is not Blanx's property, but Sizzers's, and the latter is bound to carry it away at his own expense.

**What is rejection?** is a question often asked. Well, it need not be in any particular form, so long as it is unequivocal and decided. It will not be enough for Blanx to write: "I am not at all satisfied with the coat sent home to-day," or anything of that sort. That is mere grumbling. He must go on: "I cannot accept it in its present condition," or words of that kind. He is not bound to give reasons for rejection unless he chooses—provided, of course, the coat is really a bad one. And I should add that after a reasonable time for examination has elapsed the right of rejection vanishes.

**Delivery of wrong quantity or wrong goods.**—When a customer orders goods from you, you are bound to deliver the whole of them at once, unless he has agreed to accept them by instalments. Thus, if you are a clothier, and Jones orders a suit of clothes from you, he is not obliged to take the trousers now and wait for the coat and waistcoat until next week. If you have agreed to deliver strictly on a certain day, so that Jones has the right to reject the suit if it be not then delivered, you cannot compel him to take the trousers, if you have not the coat and waistcoat ready on the day.

Occasionally a shopkeeper makes the mistake of delivering more than is ordered. In that case, the buyer may either reject the whole, or keep what he ordered and refuse the other. But if he does neither of these things—that is, if he keeps all the goods so delivered, he must pay for them at the contract rate. Thus, Mr. Mills ordered from Mr. Hart two dozen of port and two of sherry. The wine merchant by mistake sent four dozen of each. Mr. Mills took in the cases, but on sampling the wine found it was not up to the quality he expected. He accordingly returned three dozen and eleven bottles

of the port, and three dozen of the sherry. Mr. Hart said that he ought to have kept and was bound to pay for two dozen of each; but the Court held that as the tradesman had sent more than was ordered, and so had not fulfilled his part of the contract, Mills was not bound by his part. So that Mills only had to pay for the dozen of sherry and one bottle of port that he did keep.

Sometimes, also, the shopkeeper delivers to the customer **less** than is ordered; for instance, when I sent the other day to my hosier for a dozen collars he sent me only half-a-dozen, because he had only that number of my kind in stock. Legally, I had the option either of rejecting the half-dozen and so cancelling the order; or of taking them and paying at the contract rate.

And sometimes the shopkeeper delivers to the buyer the goods ordered mixed up with goods of a different description not included in the contract. In such a case, the customer may either reject the whole parcel, or pick out the goods he ordered and reject the rest. If he keeps the whole parcel, he must pay for it at market prices.

The **remedies of the seller** vary according as to whether the buyer refuses to accept delivery of the goods or refuses to pay the price. *If the buyer does not accept delivery* after the seller has requested him to do so, he is liable to the seller for any loss occasioned by his so refusing or neglecting to take the goods; and he is also liable to pay the seller a reasonable charge for warehousing. Thus, you keep a furniture shop. To you, one day, comes Mr. Jones, who orders a mahogany table of a particular size. You show one that meets Mr. Jones's approval, and he agrees to take it; but you must polish it up first. You send the table to your customer's house, by agreement, but acceptance of delivery is refused. You ought to give Mr. Jones notice to come and take the table away, and if he does not do so within a reasonable time you can charge him for warehousing. But if Jones's first refusal to accept delivery amounted to a repudiation of the contract, you can at once re-sell the table and sue him for the difference between the price he agreed to give and the price you eventually obtained.

It may be that you have let the customer have the goods without paying, and then *he will not pay*. You have then the simple remedy of an action for the price. On the other hand, it may be that the sale is for cash, and the customer wants the goods without any payment—he will pay you next week, he says. You need not hand them over, because, although it is his table, you have a lien on it for the price. [In Scotland you have the right to attach the goods while in your possession by what is called arrestment or pouding.] If you exercise your lien, and retain possession, you can keep the goods until the price of them is paid. If the money is not forthcoming within a reasonable time, you may give notice to the customer, and, if he disregards the notice, sell the goods for as much as you can get, bringing an action for the difference. When you have delivered part of a lot of goods, you may retain the rest for the price of the whole. But you cannot retain one lot of goods as against the price of another. For example—Mrs. Smith



orders a violet silk dress, price £10, which is sent to her and not paid for. Then she orders a black velvet dress, price £15, which you require to be paid for on delivery. Mrs. Smith is entitled to the black dress on payment of the £15. You cannot refuse to give it up unless she pays for the violet dress as well.

The **remedy of the buyer** if the seller refuses to deliver according to contract is to sue for damages. The compensation will be the difference between the contract price and the market price on the proper delivery day, where there is a market price. Where there is no market price for the goods in question, the customer can recover whatever damage he has suffered as a natural consequence in the ordinary course of events (*see* p. 397). When the article agreed to be sold is of such a character that the purchaser really wants that thing and no other, he may ask the judge to order it to be given up to him, without giving the shopkeeper the option of paying damages. For instance, I bought a rare book at a bookstall the other day for fourteen shillings. The book was one that I might probably never be able to purchase again. The bookseller promised to send it to my chambers. Suppose he had discovered afterwards that the book was worth more than fourteen shillings and had refused to give it up, I should have summoned him in the County Court and asked the judge to order him to deliver up the identical volume to me. You see, the return of my money and some monetary compensation would have been worthless to me as compared with the book itself. And in such a case, for fear the bookseller should dispose of the volume to another bibliophile, I should go to the Court as soon as I took out the summons (before the trial, I mean) and ask his Honour to order the tradesman not to part with the book until the action had been heard.

“**The shopkeeper’s bugbear.**”—While the *Family Lawyer* was in course of publication, I received a letter from a gentleman of Liverpool, who asked me to treat fully in this chapter of the subject of giving credit to married women, whom he more forcibly than politely styled, “the shopkeeper’s bugbear.” I think I know what was in that gentleman’s mind. It was probably the fact that a stylishly dressed lady, residing in a fashionable quarter, had come to his shop and ordered goods lavishly—perhaps dresses, or hats, or boots. And when payment was not forthcoming the tradesman sued. Perhaps he sued the husband, when he would be met by the defence that the lady had no authority to pledge her husband’s credit and had already a sufficient allowance for dress. Wherefore the shopkeeper lost his case. If you want to know why, read Book I., chapter i., pp. 19 and 20.

Or, perhaps, he sued the lady, having made inquiries and ascertained that she was a rich woman whose father had left her an ample fortune. And having won his case, and obtained an order on the lady to pay, he tried every way known to him to get his money, and has not received a penny from that day to this—though, mind you, the lady is rich as rich can be. When my correspondent took out execution against the lady’s goods and chattels, her stocks and shares, her lands and tenements, he probably found that all these were part of property settled on her by a deed or will, with a “restraint from anticipation” (*see* pp. 363-5).

Well might my correspondent, to whom I am much obliged for the suggestion, ask me to deal with the subject of giving credit to married women. My own advice is, give no credit to a married woman unless you have her husband's guarantee for payment—or the guarantee of some other person who is not another married woman. For it is such a common thing to find the married woman's property (when she has any) tied up and restrained from anticipation, that the shopkeeper who is obliged to resort to the Courts goes empty away more often than not. It should be remembered that though the Married Women's Property Acts give *materfamilias* the same right to contract—that is, to incur debts—as a single woman, the Statute nowhere says that she and her property are liable in the same way as the person and property of the spinster, or the widow, or the down-trodden male.

**Persons under age** are also an undesirable class to give credit to, for reasons that may be gathered from pp. 354–362. These young persons are liable to pay a reasonable price for “necessaries” they may buy, but no more. Whence it follows that if a youth of twenty buys even necessaries at a fancy price, he is not liable to pay the sum agreed, but only a reasonable sum.

**Small debts and the County Court.**—Most shopkeepers who do any credit trade occasionally find a difficulty in getting their money and my Liverpool correspondent appears to be one of them. For he asks me to give, step by step, the procedure in County Courts for the recovery of small debts. I do this to oblige him, at the same time advising him, if he has many debts to collect, to find some solicitor who makes a special line of debt collecting and who will undertake to collect the debts and not charge anything (except the Court fees) if the debt be not recovered. Such a solicitor would take the big and little ones together and save my correspondent a lot of time and trouble. But, for the benefit of those who wish to know how to put a debtor in the County Court, here you are. First, you go to the County Court of your district and ask for some forms of *præcipe*. Fill in one of these, with your name as plaintiff and that of the debtor defendant, in the columns provided in the form, taking care to put your full Christian name, and your address (either residence or place of business) and your description—*e.g.* “grocer”—also the defendant's Christian name, if you know it, and his address and description. If you do not know defendant's Christian name, put “Mr.,” “Mrs.,” or “Miss,” as the case may be.

You must also fill in a short statement of your cause of action and the amount of the debt or damages claimed. For example:—“For goods sold and delivered, £10”; “For work and labour done, 10s. 6d.” And when your claim is for more than £2, you must take to the Court and hand in particulars of the demand, showing the items. There must be a copy of particulars for each defendant, and a copy over, which is for the judge. The best plan is to make out a detailed bill or invoice.

When you hand in the *præcipe* and particulars to the clerk at the Court, you will pay at the rate of 1s. in the £ for Court fees, except that you never pay more than 20s. Besides this, if your claim is over 40s., you pay 1s. extra. Thus, if your claim is £1 or less, the Court fee will be 1s. If your



claim is £5, the fee is 6s. If £20, 21s. And if £40, still only 21s. Beyond £50 you cannot go in the County Court. In return the clerk will hand you what is called a "plaint note." And you must take care of this document, for without it you cannot proceed with your action. The bailiff of the County Court will see to it that the summons is served upon the defendant.

On the day named in the summons you appear at the County Court, and pay a further fee of 2s. in the £ as "hearing fee"; except that where the defendant admits the claim, or you agree with him for judgment for a certain amount, or he does not appear to contest the claim, you pay 1s. in the £. If the defendant does not appear or write to admit the claim, you must be prepared to prove it. Thus, in the common shopkeeper's action for goods sold and delivered, you must prove the order and the delivery of the goods to the defendant, or to a carrier for him. If you can—either yourself or one of your employees—swear that the defendant has admitted the claim to you and has promised to pay, that is enough. You should recollect that the mere fact of your having an entry in your books that the goods were ordered and supplied proves nothing. Someone must give evidence who took the order or delivered the goods, or to whom the defendant admitted his liability. And always take your "plaint note" with you, or you will not be heard.

When you have got your judgment, you may issue execution against the debtor's goods, if he have any. And you will pay 1s. 6d. in the £ on the amount for which you issue the warrant of execution, but not more than 30s. in any event. This warrant is prepared by the clerk at the County Court, to whom you must go and make your request, taking care to show him the "plaint note" and pay the fee.

If the debtor has no goods, you issue a judgment summons. Go to the County Court, take the "plaint note," and ask for a judgment summons. For this you pay 3d. in the £, with 6d. extra for a debt of only £1, and 1s. extra above that. On the day appointed for the hearing you appear before the judge, paying a fee of 6d. in the £. And then you must prove to the judge what the defendant's means are, and the judge will order him to pay according to his means, either the whole or by instalments, or go to prison for not more than six weeks. Remember, before the judge will make such an order it is for you to prove that the defendant is able to pay.

Suppose His Honour says, "Ten shillings a month, or fourteen days"—that is, the defendant to pay at that rate, or go to prison for fourteen days—the defendant will probably pay. Say he pays the first instalment and misses the next. Then you go down to the office of the County Court again and ask for a "committal warrant," which is a piece of paper commanding the bailiff to arrest the debtor and take him to prison. You will have to pay 1s. 6d. in the £ on this. Having had the debtor arrested once, you cannot touch him again for that instalment. And a judgment summons against a married woman is of no avail, because the judge cannot send her to prison if she pays not. The polite fiction is that her husband has greater need of her society than the tradesman has of his money.

Observe, please, that I have only given here the procedure when you want to issue a summons against a debtor residing or carrying on business in the same district as yourself. The procedure is a little more complicated when he lives elsewhere. For instance, you can only summon him in your own County Court when he used to dwell in your district or carry on business there within six calendar months before issuing your summons, or where a material part of the cause of action arose within your district. The giving of an order for goods is a material part of the cause of action. So is the delivery of them. If Jones in London sends an order to Smith of Manchester for a new coat and Smith is to send the coat by rail, Jones paying the carriage, the railway company are Jones's agents to receive the goods and the goods are held to be delivered to Jones in Manchester. Therefore Smith can sue Jones in Manchester County Court. If you want to sue a person not residing or carrying on business in your district, go to your County Court and ask for a "form of affidavit to issue summons out of the jurisdiction." On that form you will find directions as to filling in and you will go before the Registrar and get his leave to issue your summons. Otherwise it is the plaintiff's duty to sue in the debtor's Court—*i.e.* where the debtor resides or carries on business. One exception is in the Metropolitan districts, which comprise Greater London. If plaintiff and defendant carry on business or reside in any of these districts, the action may be begun (without leave) in either or any of the districts. For example, Jones wants to get out of Brown 10s. 6d., the price of a pair of boots. Jones has a shop in the Bloomsbury district, but he lives in the Shoreditch district. Brown's office is in the City of London district, and he lives in the Marylebone district. Jones has the choice of four County Courts in which to issue his summons.

I ought to say that when you have paid the fees above-mentioned you are entitled to recover them from the debtor, as they are added to your debt. But the rule is subject to this—that if you recover less than you claimed, you can only get from the debtor the fees that would have been payable on the amount recovered. Thus, if you claim £10, the "plaint fee" is 11s. (*see* p. 677); and if the judge only awards you £7, you can only get 8s. "plaint fee" out of the defendant. Again, the plaintiff is not entitled to an allowance for expenses as a witness is, though he is entitled to any actual out-of-pocket travelling expenses to be added to his judgment. But any other witness is entitled to an allowance according to his rank and calling, and you should ask the judge to make an order for that witness's expenses.

#### SHOP ASSISTANTS.

**Fines.**—For many, many years, shop assistants laboured under one grievance that was almost intolerable. This grievance was the "fine system." I know that every shopkeeper who employs a large number of assistants must maintain discipline amongst them, or his business will soon be in a chaotic state. To this intent the fine system was introduced. There were fines for unpunctuality, fines for chattering and gossiping, fines for sitting down, fines for making mistakes in reckoning, fines for all sorts and kinds of breaches of rules.



serious and trivial. Now the infliction of these penalties was very often in the hands of the shopwalker—generally without appeal. That was grievance number one. And the amounts exacted were frequently quite out of proportion to the offence. That was grievance number two. For example:—A common fine was one of 6d. for not being in the shop ready for work at (say) eight o'clock, with an additional 6d. if the delinquent were more than ten minutes late.

Now, the wages of many shop assistants do not amount to more than 12s. to 16s. a week. I refer especially to the wages of young women in the large drapery establishments. Take it at 16s.—that is, 2s. 8d. for a working day of at least ten hours on the average, or not quite  $3\frac{1}{4}$ d. an hour. A deduction of nearly two hours' wages for the loss of ten minutes' time is surely disproportionate, even allowing for the fact that the machinery of the shop might be slightly put out of order by the assistant not being in her place. So also the common penalty of a 6d. fine for "speaking back" to the shopwalker, when looked at as the taking away from the culprit of about one-fifth of her day's pay, appears a trifle excessive. Moreover, as was alleged in the House of Commons, in some shops the "offences" were so numerous that it was almost impossible for an assistant, however well-disposed, to pass through the day unscathed. I need hardly say that in the houses last referred to the wages were not on such a munificent scale as to render a 6d. fine a trifling matter to the sufferer.

By the **Truck Act (1896)**, the Legislature endeavoured to redress the grievances aforesaid. Without saying that fines are not to be imposed on assistants for infractions of rules or for acts causing damage to the shopkeeper, the Statute has imposed the principle that all such fines are to be fair and reasonable—are to be rather in the nature of compensation to the employer than punishment inflicted on the employed. The section of the Act (section 1) referred to runs as follows (omitting verbiage):—

An employer shall not make any contract with any shop assistant [or workman] for any deduction from wages for or in respect of any fine, unless—

(a) The terms of the contract are notified in a notice constantly affixed to a place open to the assistant; the position to be conspicuous, so that the notice may be easily read and copied. Or there is a written agreement, signed by the assistant. The contract does not require a stamp (section 7).

And (b) the notice or agreement specifies the finable acts or omissions and the amounts of the fines, or the particulars from which such amounts may be ascertained.

And (c) the finable act or omission causes, or is likely to cause, damage or loss to the employer, or interruption and hindrance to his business.

And (d) the amount of the fine is fair and reasonable, having regard to the circumstances of the case.

Further, no fine can be imposed unless (a) there is such a contract as aforesaid, and (b) particulars in writing, showing the acts or omissions fined for and the amount of the fine, are supplied to the assistant on each occasion that a fine is inflicted.

Other sections provide that the shop assistant may recover any sums paid to the employer contrary to the Act; but legal proceedings must be commenced within six months from the date of the fine sought to be recovered. When the assistant consented to, or acquiesced in, the deduction from his wages, he can only recover the unreasonable excess. That is, the Court will decide what would have been fair and reasonable, and order the employer to repay anything exacted by him beyond this. If there was no contract in writing; or no notice as required by the Act; and if the assistant at the time protested against being fined, he can recover the whole amount (section 5).

Every assistant who has entered into a "fining" contract is entitled to a copy of the notice, or of the written contract [see section 1 (a)], free of charge from his employer at the time the contract is made (section 6, subs. 1.) He is also entitled to a copy of the contract, or notice, on request (section 6, subs. 2) apparently at any time. And by section 6, subs. 3, the employer must keep a register of deductions and payments on account of fines, specifying the nature of the act or omission, and the amount of the fine imposed. A breach of section 6 renders the employer liable to a fine of forty shillings on conviction before a magistrate. The maximum penalty for deducting a fine from wages in breach of the Act (section 1), or for making a contract contrary to the Act, is not less than £5 nor more than £10 for the first offence: not less than £10 nor more than £20 for the second offence: and the third or any subsequent offence is a misdemeanour, subjecting the employer to any fine not exceeding £100.

By way of making this Statute quite clear, let me say that (1) no fine can be imposed by the master nor deduction made from wages by way of fine unless there is a contract to that effect between the master and the assistant.

(2) The contract may be in writing or otherwise. If in writing it must be signed by the assistant. Otherwise the terms of the agreement must be posted up in a conspicuous place.

(3) Merely exhibiting such a notice in the shop will not give the employer the right to fine his assistants. For there can be no contract without the consent of both parties, which consent must be communicated to one another (p. 246). But consent may always be given and communicated by conduct as well as by word (p. 251 *et seqq.*).

So much for the formalities. The next thing is to consider the essence of the Act—namely, that **fining must not be arbitrary**; but must be in respect of some act or omission causing or likely to cause damage or hindrance to the employer, and must be fair and reasonable in the circumstances of the case. The words "fair and reasonable" may lead to some difference of view on the part of the Courts. I suggest that it would be held unfair and unreasonable to deduct two hours' wages (or even one hour's) for two minutes of unpunctuality. It would also be unfair and unreasonable, in my opinion, to place the fining power in the hands of the shopwalker, without appeal; also to deduct sixpence for talking to a fellow-assistant—though a penny fine might not be too much. The whole question in each case will be, Did the assistant do anything which actually caused or would be likely to cause damage or hindrance? And when you consider the likely effect of the act or omission,



you must look at the matter reasonably, bearing in mind the fact that if sixpence is the value of a woman's services for two hours, the loss of these services for two minutes can hardly cause the employer to lose sixpence. If so, he admits at once that the girl is underpaid. On the other hand, the absence of one assistant for a few minutes may paralyse the work of a whole department. Unlimited chattering amongst the assistants would convert the once orderly shop into a pandemonium, and customers would inevitably complain of lack of attention. As a member of the public, I heartily wish that the Postmaster General would discover a way to stop the inordinate amount of gossiping and giggling carried on by the staff of more than one post-office within the four miles' radius of Charing Cross. I have been kept waiting very often while two or three young women talked of something which caused them to giggle consumedly. Were these establishments private shops I should never enter them again after such treatment. And this causes me to reflect that conversation amongst shop assistants causes or is likely to cause hindrance to the employer's business; and is also likely to cause him to lose custom. Therefore it is not unreasonable that some sort of fine should be hung *in terrorem* over the heads of assistants with a tendency to gossip; but, How much? is the question. And in this connection we must not forget that the fine must be not only reasonable, but "fair." I should think that fairness depends on the frequency of the offence, the actual damage caused and, to some extent, the proportion between the fine and the assistant's wages.

Some of the employers seem to have taken it into their heads that this statute gives them a right to inflict fines greater than they had before. This is quite wrong. Before the Act a fine could be imposed without any previous agreement. Since the Act it can only be imposed when an agreement has been previously made as above. And the agreement so far as it is unreasonable or unfair is quite worthless in law.

Lastly, it should be noted that the Home Secretary has power to make an order exempting any trade, or any district, or any trade in any district from the operation of the Act. The order must come before Parliament by being laid on the table of both Houses; and if either House resolves that the order shall be annulled or cancelled within forty days, the order shall be annulled.

**The hours of employment.**—There is no restriction on the hours during which a shop assistant may work at the shop, except in the case of young persons. By the Shop Hours Act, 1892, a young person is defined (for the purposes of the Act) to be a person under the age of eighteen years, and the Statute contains provisions to prevent young persons from working excessively long hours. The kernel of the matter is contained in section 3 (1), which provides that "No young person shall be employed in or about a shop for a longer period than seventy-four hours, including meal times, in one week." This subsection is an instance of Parliamentary draughtsmanship that deserves to be handed down as a warning example to posterity. What it means I decline to attempt to say. It is clear that no young person is to be employed in or about a shop for more than seventy-four hours in one week. The difficulty comes in when you deal with the words, "including meal times." This may mean,

including the time allowed for meals that are to be taken on the premises. If so, shop assistants who "live in" will be able to count breakfast time as part of the day's work, though, in fact, the work does not begin until after breakfast. It might also (though this is rather straining the argument), on the strict literal construction of the subsection, include supper time, provided the supper is taken on the premises. Further, if the words "including meal times" are to be read with "in or about a shop" so as to apply to meals taken on the premises, and not to meals eaten elsewhere, the shopkeeper can easily increase the hours by compelling his assistants to go outside for their meals. On the other hand, if magistrates hold that the Act applies whether meals are eaten on or off the shop premises, there seems nothing to prevent an assistant who does not "live in" from counting in all his meal times—including breakfast eaten at home before work, and supper after. To such ludicrous interpretations does this Act lend itself.

But if I were a magistrate I should hold that the day (for the purposes of the Act) begins when the "young person" does something in or about the shop in the way of employment and ends when the employes leave off work. I should hold that all meal times between those hours, wherever the meals are consumed, count as part of the seventy-four hours per week. Thus, take a shop where all assistants must be in their places ready for work at 9 a.m., and leave work at 8 p.m. There would be (probably) half an hour allowed in the middle of the day for dinner, and about twenty minutes in the afternoon for tea. Breakfast is taken before 9 a.m., and supper after 8 p.m. Dinner and tea times would count as working hours, but breakfast and supper time, would not.

It has been decided that an **errand-boy** is "employed in or about" the shop within the meaning of the Act, though he goes into the shop only for a few minutes to receive his orders.

**Hours of assistants employed partly in workshops and partly in shops.**—By the Factory and Workshops Act, 1878 (pp. 691 *et seqq.*), it is forbidden to employ young persons in or about any factory or workshop except as follows:—They may work from 6 a.m. to 6 p.m.; or from 7 a.m. to 7 p.m.; or in certain cases the employer may, if he likes, alter the time for beginning to 8 a.m., in which case the hour for closing is 8 p.m. There is in this Act a provision for a half-holiday on Saturday.

In the chapter on The Law of the Manufacturer I shall deal with the Factory and Workshop Acts in detail. At present I am only concerned with those workshops that are connected with shops. Such are, for instance, millinery and dressmaking establishments, tailors' shops, and the like, where the goods sold in the shop are made up in a workshop on the premises. By section 42 of the Act of 1878, the period of employment of "young persons" in certain kinds of workshops may be fixed by the employer to begin at 8 a.m. and end at 8 p.m., except on Saturdays, when the time is from 8 a.m. to 4 p.m. If the employer chooses to come within the general rule, he may work from 7 a.m. to 7 p.m., and on Saturdays from 7 a.m. to 3 p.m. Most, if not all, of the workshops connected with shops come within this category, including, as they do, workshops for the making of any article of wearing apparel, the making of



furniture hangings, the making of bonbons and Christmas presents, and any part of a factory or workshop which is a warehouse used solely for polishing, wrapping, or packing up goods. By the Act certain meal-times must be allowed, for which see the next chapter.

**Dressmakers' and milliners' assistants** were at one time under a rather solid grievance. It was a practice not uncommon for a young woman employed at this kind of establishment to be kept in the workroom during the hours allowed by the Factory and Workshops Act, and then to be requested to assist in the shop for a time. I have heard of young girls who, when the workroom closed at 4 o'clock on a Saturday afternoon, have been addressed in these terms, "Miss Tomson, we are very busy in the shop to-day. Will you assist behind the counter?" And of course Miss Tomson could only refuse on peril of losing her situation. Since the Shop Hours Act (1892), such a course is now impossible, provided the assistant is a "young person," for section 2 (subsection 2) of that Statute enacts "that no young person shall, to the knowledge of his [or her] employer, be employed in or about a shop, having been previously, on the same day, employed in a factory or workshop for the number of hours permitted by the Factory and Workshops Act (1878), or for a longer period than will, together with the time during which he [or she] has been so employed, complete such number of hours." The effect is that, if Miss Tomson has worked in the workroom from 8 a.m. to 8 p.m., or from 8 a.m. to 4 p.m. on Saturday, the employer is liable to be fined for permitting her to serve in the shop after these hours. But the employer may, for instance, take Miss Tomson out of the workroom at 1 o'clock on Saturday and employ her in the shop until 4 p.m., but not later.

**Errand-boys.**—A further effect of this part of the Act is to make it illegal for a shopkeeper to employ a boy or girl under eighteen who works in a workshop or factory to run errands after factory hours. Before the Act this was often done. For instance, a boy of fourteen working in a factory would often be engaged as errand-boy at a grocer's shop on Saturday afternoons and evenings. A friend of mine, now a member of a learned profession, told me that when he was a boy he worked in a cotton-mill in the North of England. His hours were from 6 a.m. to 6 p.m., and from 6 a.m. to 2 p.m. on Saturdays. His wages were all given to his mother. But this boy, being desirous of study, would run errands for a grocer for an hour or so every evening—longer on Saturdays—receiving a shilling a week for his trouble. Out of the shillings so earned he bought books and in a few years boasted quite a library of scholastic and scientific works. To that shilling a week, he says, he was indebted for his rise in life. Under the new *régime* that shilling could not have been earned—at all events, in that way, for the grocer would have been liable to a fine for employing a young person "in or about a shop" after he had worked in a factory the full number of hours allowed by the Factory and Workshops Act. The penalty for employing a young person beyond the hours allowed by the Shop Hours Act is a fine not exceeding 20s. for every young person so employed.

**To what establishments the Shop Hours Act applies.**—The Statute

applies not only to retail shops, but also to wholesale establishments for the sale of goods, and to markets, stalls, warehouses, refreshment rooms, and public-houses. **It does not apply** to shops where the only persons employed are members of the same family, dwelling in the building of which the shop forms part, or to which it is attached. Nor does it apply to a member of the employer's family living in the building, nor to a domestic servant.

Moreover, the Home Secretary may, if he think fit, declare any district exempt from the Act. He may also declare any trade exempt, or any trade in a particular district.

The **enforcement** of the Shop Hours Act is in the hands of the local authorities. Inspectors to enforce the law have to be appointed in England by the Town, City, and County Councils; in Scotland, by the County Council of a county, the Commissioners of Police of a burgh, or by the Town Council where there are no such Commissioners; and in Ireland by the Council of any municipal borough and by the Commissioners of any town or township. These inspectors have the right to enter any "shop" within the meaning of the Act, and summon any employer who is found infringing its provisions.

**Notice of hours is to be posted** in every shop in which a young person is employed. The notice must be "conspicuously exhibited." It must refer to the provisions of the Shop Hours Act (1892), and must state the number of hours in the week during which a young person may be lawfully employed in that shop. The penalty upon an employer who fails to comply with this section is a fine not exceeding 40s. Shopkeepers should observe that the Act compels them to put up the notice in a *conspicuous* place in the shop where the young person is employed. I suppose, under the section, a notice will have to be conspicuously posted in every room where a young person works. The object is to let the young persons know what their rights are. And it is just as much an offence for the notice not to be conspicuously posted as for no notice to be posted at all.

**How the shopkeeper may escape liability.**—The Shop Hours Act (1892) contains one curious proviso that every shopkeeper ought to know. When he is charged with any offence against the Act, he is entitled, when he receives the summons from the Court, to go before the magistrates and lay an information against somebody else whom he declares to be the real offender. Then a summons is to be issued against that person, who is commanded to appear at the Court at the time appointed for hearing the original charge against the employer. If the inspector proves an offence—*e.g.* that no notice of hours was conspicuously posted up, or that some young person was employed for more than seventy-four hours per week—then the employer can try to shift the responsibility on to the shoulders of him whom he alleges to be the real culprit. Thus, Evans, the draper, is charged by an inspector with permitting Mary Jones, a young person of seventeen, to be employed about his shop for more than the proper number of hours. Evans, on inquiry, finds that Mary has been so employed, having been kept late one evening by Tomkins, the manager of the calico department. Nevertheless, this detention of Mary beyond proper hours was clean contrary to Evans's own orders. Therefore Evans, as soon as he gets



the summons, hies him to the Magistrates' Office, and obtains a summons against Tomkins—or an order for Tomkins to appear. At the trial the inspector proves that Mary Jones was wrongfully employed, contrary to the Act. Then Evans's case against Tomkins is gone into; and if Evans can prove that he used due diligence to enforce the Act, and that Tomkins detained Mary without his (Evans's) knowledge, consent, or connivance, Tomkins shall be convicted in the room of Evans, Tomkins shall pay the fine, and Evans shall leave the Court unblemished and unscathed. If I were a magistrate administering this Act, it would take a great deal to make me believe that Tomkins detained Mary at work for Evans's benefit without Evans's knowledge, consent, or connivance. Why should he? What would he gain by it? Yet, if such a case should occur to any shopkeeper who reads this book, he knows what to do.

**Receipts for money paid.**—Until 1891 there was no way of compelling anybody to give a receipt for money paid, and even now there is only a limited right. Section 103 of the Stamp Act, 1891, provides that when a person *refuses* to give a *stamped* receipt in cases where by law a stamp would be required, he is liable to a penalty of £10 to the revenue. Now, a stamped receipt is not required unless the money paid is £2 or more, and therefore there is no way whatever of compelling a creditor to give a receipt for a sum of less than £2. It comes to this: I owe you £2 2s., pay you, and ask for a receipt. You must give me one, or else I can inform the commissioners of Inland Revenue, and they will cause you to be fined. But suppose I say, "I will not pay you the £2 2s. unless you give me a proper receipt," I shall be in the wrong. If I owe money, I am bound to pay it. There is no obligation on you to give a receipt, except such as exists under the stamp laws; and that is not my affair, but is between you and the Revenue authorities.

Again, **no man is bound to give a receipt unless he is asked**; for you cannot say that he "refuses" unless a demand has previously been made. But if he does give one, whether asked or not, it is bound to bear a penny stamp if it is for £2 or over. The man who receives the money must find the stamp. And remember again, that **a debtor cannot refuse to pay because a receipt is refused.**

## CHAPTER VII.

### THE MANUFACTURER.

Leasing mill with power—"Room and power"—A grievance—Goods spoilt by power fluctuating—THE FACTORY ACTS—Short history—What are factories—Textile and non-textile—What are workshops—Domestic—Hours of labour for women, children and young persons—Children's hours—Sets or alternate days—No overtime in textile factories—Overtime in other factories and workshops—Restrictions on amount of overtime—Overtime different in different classes of works—When night work is allowed—Overtime and overcrowding—"Spells"—Works where children and young persons not allowed to work—Time and place for meals—Generally all must feed at once; but not always—Women after childbirth—Half-timers—School—Holidays—SAFETY OF THE WORKPEOPLE—Dangerous parts of machinery—Tenement factories: who is liable—Self-acting machines—Cleaning machine in motion—Law for Sheffield—Ruinous and dangerous buildings and machines—Fire!—SANITATION—Consisting of cleanliness, air-space, and ventilation—Who is responsible—Clothes made in fever dens—THE SALE OF GOODS—Quality—Hidden defects of manufacture—Sale of goods to be made—"Warranted our own make"—The Merchandise Marks Act—PATENTS AND TRADE MARKS—What is a patent?—Advice to inventors—The Cordite case—What is a trade mark?—How to protect it—To what a trade mark is limited—The remedy for infringement—Civil and criminal—"Made in Germany"—Trade name—Unscrupulous rivals—Palming their goods off as yours.

Leasing a mill or factory with power is a very common thing in manufacturing centres. The lease takes this form: the owner lets so many rooms of a mill, and also steam or other power for the purpose of turning the tenant's machinery, at a rent varying, as a rule, with the quantity of power used. The way for this to be expressed is:—

The lessor doth hereby demise to the lessee All those three rooms being and constituting the first floor of and in the mill or building situate in Black Lane, Bolton, and known as "Moffles' Mill" And also steam-power for the proper and effectual turning and working of power looms and machinery equal to such an amount of horse-power, not exceeding 15 horse-power, as the lessee may from time to time require.

This form binds the landlord to supply up to 15 horse-power if requested. And the usual thing is for the tenant to pay in proportion to the amount of horse-power used. The following is how to provide for this:—

Paying therefor yearly and so in proportion for any period less than a year, the rents following, that is to say, the yearly rent of £ [this is for the room and up to 10 horse-power], and also for each quarter of a year ending on one of the usual quarter-days during which the lessee shall at any time use more than 10 horse-power, the additional rent of £ for such horse-power so used.

The great grievance of manufacturers who rent "room and power" is that after they have stipulated for (say) 15 horse-power, and for the "proper



and effectual turning and working" of their machinery, the owner or his servants either purposely or negligently allow the power to fluctuate, so that the shaft does not run at the speed stated in the lease, and the goods on the machine are spoiled or damaged. A Huddersfield manufacturer has written to me asking what precautions ought to be taken by the tenant, and what his rights are if his goods are damaged. In the first place, I should recommend a clause in the lease in this form or to the same effect:—

Provided that if at any time during the continuance of this lease steam-power shall not be duly supplied to the lessee according to the agreement herein contained, unless the same shall be by the fault or at the request of the lessee, then and during that time a proportionate part of the rent otherwise becoming payable during the quarter shall be remitted [*and it is better to go on, if possible*], such remission to be calculated at the rate of        shillings for every horse-power not so duly supplied for each day during which or during any part of which the horse-power is not so duly supplied. And the lessee shall be at liberty to deduct the said sum from the next rent that shall or may become payable by him to the lessor.

Such a clause enables the manufacturer to stop out of his rent a sum proportionate to the owner's failure to supply the power. I also advise the tenant to insist on a clause like this:—

The lessor will at all times not being days generally used as holidays between the hours of [six] o'clock in the morning and [six] o'clock in the evening, but on Saturdays till [one] o'clock only, at his own expense, provide and maintain steam-power not exceeding 15 horse-power sufficient for the proper and effectual turning of the lessee's machinery. And also will at all such times as aforesaid keep the main shaft in the [lower] room of the said mill to        revolutions per minute

If the mill-owner breaks this agreement, the manufacturer can sue him for damages for any goods spoiled or time lost in consequence of the ineffectual working of the main shaft.

The claim in an English County Court will be "£        damages for breach of covenant in a lease, dated the [25th] day of [March], 1897, and made between the plaintiff and the defendant."

It should, however, be noticed that unless there is a special agreement to that effect, the damage sustained by fluctuation or stopping of the power cannot be deducted from the rent. Nor does the lease become null and void on that account. The best protection for the manufacturer is to agree in this wise:—

And it is further provided that if the power agreed to be supplied be not supplied, or the speed contracted to be kept be not maintained (except from strikes of workmen, fire, or any other inevitable accident) for a consecutive period of [seven] days, the lessee may give notice, in writing, to the lessor to determine this lease at the end of [        ] days; and at the end of the period of notice the lease shall determine and become of none effect, and the lessee shall pay only an apportioned part of the rent hereby reserved, but without prejudice to his claim (if any) for compensation, deduction from rent, or damages consequent on the failure of power or the failure to maintain the speed agreed upon

### THE FACTORY ACTS.

The Factory Acts and the other legislation on the regulation of factories form a monument of the perverse British way of making laws. The mode is, when a



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grievance arises, and Parliament makes up its mind and finds plenty of time to redress that grievance, to pass a Statute just going far enough to meet the public demand, and no farther. Parliament never legislates with an eye to the future, and hardly ever legislates on anything like general principles. The first Act of the kind now under discussion was passed in 1802, and was an "Act for the preservation of the Health and Morals of Apprentices and others employed in Cotton and other Mills, and Cotton and other Factories." The cotton and woollen factories and mills of the kinds mentioned in the Act were to be washed with quicklime twice a year; the apprentices employed were to be supplied with sufficient clothing, and to be instructed in the elements of the Christian religion. There were also restrictions on the hours of labour of apprentices.

Not long after this first Factory Act was passed, machinery began to be used, not only in the cotton- and woollen-spinning industries, but also in scores of other trades. Cotton-printing machines, lace-making machines, stocking-knitting machines—to name two or three out of many, all worked by steam or water power, and later by gas and electricity—quickly ousted the painfully slow handiwork of the ancient craftsman and the hand machine. As soon as you get your power supplied by steam and your force by mechanical devices, the strength of the workman becomes of little importance. All you want is intelligence, watchfulness, and industry. And when the genius of the inventor creates a machine that will accomplish almost all the work, provided it be fed, all you want is somebody to feed the machine. Hence arise the decay of the handicraftsman and the large employment of female and juvenile labour.

To men like the seventh Lord Shaftesbury it soon became apparent how injurious it was to the State that young people and women should be allowed to work twelve or fourteen hours a day—or even more—without holidays, amid the ceaseless whirr of wheels, the clang of machinery, and the heat generated by the power used. Especially did this apply where the working-place itself was overcrowded, ill-drained, and without sanitary convenience. Legislation was eventually brought about, applicable first to one trade, then to another; now to this kind of factory, then to that; amended and re-amended, until at last the law was in such a state of muddle that very few knew what it did mean. One principle ran through the whole of it—which was, that women and young persons should be restricted in their hours of labour. Another principle also crept in—namely, that workpeople should work, as far as possible, under good sanitary conditions. And it has been pointed out that the laws passed in modern times to provide for the sanitation of towns are the result of the inquiries made into the conditions of employment in factories and workshops.

At last, in 1878, under the auspices of Mr. (afterwards Viscount) Cross, the then Home Secretary, a consolidating and codifying Act passed into law. This Statute remains the principal one, though it has been altered and added to by the Factory and Workshops Acts of 1883, 1891, and 1895; the Cotton Cloth Factories Act of 1889; the Shop Hours Acts, 1892, 1893, and 1895 (*see* pp. 682-6); and the Quarries Act, 1894. Moreover, certain regulations have been imposed by the Public Health Acts as to sanitary matters; and other regulations for the education of children by the Education Acts. In fact, the



time has come when the Lords spiritual and temporal and her Majesty's faithful Commons in Parliament assembled should put into one Statute the law on this important subject.

**What are factories and workshops** within the Acts? First of all, for the distinction between factory and workshop. A factory is a place where power is used—*i.e.* where machinery is moved or worked by steam, water, or other mechanical power; other manufacturing-places are called workshops. Then factories are subdivided into "textile" and "non-textile"; and workshops into "workshops" pure and simple, "workshops in which neither children nor young persons are employed," and "domestic workshops." With regard to all of these there are slightly different rules. And there are some trades called "dangerous employments," where the process of manufacture or the machinery necessarily used is specially injurious to health or dangerous to life and limb. With regard to these trades still different rules prevail.

A **textile factory** is one in which machinery worked by power is used in preparing, manufacturing, or finishing, or in any process incident to the manufacture of cotton, wool, hair, silk, flax, hemp, jute, tow, china-grass, cocoanut fibre, or other like material. But a few kinds of trades where raw material of one or more of these descriptions is made up into the manufactured article or otherwise dealt with are not classed as textile. These are print works, bleaching and dyeing works, lace warehouses, paper mills, rope works, hat works and flax scutch mills.

A **non-textile factory** is "any premises wherein any manual labour is exercised by way of trade or for purposes of gain (*a*) in making any article or part of an article, (*b*) in or incidental to the altering, repairing, ornamenting, or finishing of any article, or (*c*) in adapting any article for sale, where machinery worked by steam or other power is used;" and hat works, rope works, bake-houses, lace warehouses, shipbuilding yards, quarries, and pit-banks where such power-worked machinery is used. If no machinery be used, the last-named seven places are workshops within the Act, and not factories.

Then there are nineteen specified classes of works which are non-textile factories, whether power-driven machinery is used or not. These are print works (*i.e.* where patterns are printed on textile fabrics, not paper), bleaching and dyeing works (including the processes like calendering and finishing yarn, cloth, or lace), earthenware or china works (including ornamental tiles), lucifer-match works (except places where only the wood is cut up), percussion-cap works, cartridge works, paper-staining works, fustian-cutting works, blast furnaces, copper mills, iron mills (including steel and tinplate works), foundries, metal and india-rubber works (including places where machinery is manufactured), paper mills, glass works, tobacco factories, letterpress printing works, bookbinding works, flax scutch mills. So that "non-textile factories" includes places that may not be factories at all (the above nineteen), and also factories really textile in their nature.

The Act of 1895 also created special rules concerning **tenement factories**; places, that is, where mechanical power is supplied to different parts of the same building occupied by different persons as separate factories. This kind of factory

is common in the north of England, especially in Sheffield, where you find a good many manufacturers in a small way of business. One of these small manufacturers hires a room or two in a big building where there is steam or other power, and he connects his machinery with this power. That is, having no power of his own, he hires some from the landlord of the building. You often find half a dozen independent concerns in the same building, each hiring power supplied to the whole premises from the same steam-engine or water-wheel.

A **workshop** is a place, not being a factory, where articles are made, altered, repaired, ornamented, finished, or adapted for sale, by means of manual labour exercised for gain. The list of classes of works given in the last paragraph but one are workshops if no power-driven machinery is used.

**Domestic workshops** are private houses, places, or rooms, where no power is used, and in which the only persons employed are members of the same family who dwell there and are subject to special rules; but the house or room is not a workshop if the work done there is not the sole or principal means of livelihood of the family. And straw-plaiting, pillow-lace making, and glove-making, if carried on in a private house by the family living there, are quite outside the Factory Act.

Then workshops where **no children or young persons** are employed are a separate class for some purposes; as also are workshops where **only male adults** (over eighteen) are employed.

#### HOURS OF LABOUR FOR WOMEN, CHILDREN AND YOUNG PERSONS.

The differences between the law as to textile and non-textile factories are mainly as to the hours of labour of the women, children, and young persons employed.

(a) In textile factories the **hours of labour for young persons** (14 to 18) and **adult women** are from 6 a.m. to 6 p.m., or 7 a.m. to 7 p.m., with two hours for meals. One meal hour must be before 3 p.m. On Saturday the hours are 6 a.m. to 12.30 p.m., or 7 a.m. to 1.30 p.m., with half an hour for meals; or the hour for leaving work may be made half an hour later if work begins at 6 a.m., provided one hour is allowed for meals. In addition, half an hour may be added of employment for any other than a manufacturing purpose—for instance, to clean up, or to run an errand.

(b) In non-textile factories, the hours for young persons and women may begin either at 6, 7, or 8 in the morning, and stop at 6, 7, or 8 in the evening respectively; and only one hour and a half need be allowed for meals. So that the meal-hours allowed are shorter than in textile factories. And on Saturdays the employment may be from 6 a.m. to 2 p.m., from 7 to 3, or 8 to 4, with half an hour for meals. And, moreover, the employer may employ on a Saturday from 6 a.m. to 4 p.m. any young person or woman who has not been employed for more than eight hours on any day in the week. But two hours must be allowed for meals; and notice of the previous non-employment for more than eight hours must be affixed in the factory and served on the local factory inspector.

(c) In workshops, the hours of labour for women and young persons are the same as in non-textile factories (*see* above). But in workshops where no young



persons or children are employed, women may work for a specified period of twelve hours between 6 a.m. and 10 p.m., allowing for meals and absence from work a specified period of at least one hour and a half. On Saturdays the hours are a specified period of eight hours between 6 a.m. and 4 p.m., with half an hour for meals. In domestic workshops there is no restriction on the employment of women.

A difference between factories of both kinds and workshops is that the factory inspector is charged with the duty of enforcing the **sanitary regulations** in respect of factories; while the local sanitary authority (*see* Book II., Chap. 3) looks after workshops. And I need hardly say that the provisions of the Factory Acts relating to machinery do not apply to workshops.

With regard to the **employment of children** (under 14), the hours vary slightly. In both textile and non-textile factories and in workshops such employment may be on the alternate day system, or the morning and afternoon set system. Where employed on alternate days, the child must not be employed on two successive days, nor on the same day in two successive weeks. Thus, it must be Monday, Wednesday, and Friday in one week, and Tuesday, Thursday, and Saturday the next; and the hours in textile factories are the same as for young persons and women (*see* p. 691). In non-textile factories and workshops the hours are the same as for young persons and women (p. 691), except that two hours instead of one and a half must be allowed for meals.

The morning and afternoon set system is very much the same all round. (a) In textile factories the morning set begins at the same hour as the young persons' work (6 or 7), and ends either at 1 p.m. or the beginning of the dinner-hour, if before 1 p.m. The afternoon set may begin at 1 p.m., or at the end of the dinner-hour, if after 1 p.m. If the dinner-hour begins as late as 2 p.m., the morning set may end and the afternoon set begin at 12, noon. And this will be the most convenient plan when the dinner-hour is taken so late as 2 p.m. The afternoon set ends when the hours of employment of young persons end in the factory (*see* p. 691).

(b) In non-textile factories and workshops the morning set begins at 6 or 7 a.m., or 8 a.m. if that be the "young persons'" hour. It ends at 1 o'clock, or the beginning of dinner-hour, if before 1. The afternoon set begins at either 1 p.m., or the end of dinner-hour, if after 12.30 p.m. Here also, as in textile factories, the morning set may end and afternoon set begin at 12 noon, where the dinner-hour is as late as 2 p.m. The afternoon set ends at 6, 7, or 8 p.m., according as the morning set begins at 6, 7, or 8 a.m.

On *Saturdays*, when the alternate day system is used (a) in textile factories, the period is the same as for young persons; (b) in non-textile factories and workshops, from 6 or 7 a.m. to 2 p.m.; or from 8 a.m. to 4 p.m. (if that is the period for young persons in that factory). Half an hour is allowed for meals. When the "set" system is used (a) in textile factories, the same hours as for young persons, except that no child shall be employed for two successive Saturdays, nor on Saturday at all if his hours on any day in the same week have exceeded five and a half. (b) In non-textile factories and workshops the period for a "set" is the same as on other days, except that a Saturday afternoon set must

end at 2 p.m.; unless the morning set began at 8 a.m., when it will end at 4 p.m. The result is that children employed in sets must get a half-holiday one Saturday and almost a whole one the next; and those employed on alternate days must get a whole holiday one week, and a half-holiday the next.

(c) In domestic workshops (*see* p. 691), although there is no restriction on the hours of labour for women, the period of employment for children and young persons is limited. For young persons the hours are 6 a.m. to 9 p.m., with four and a half hours for meals; and on Saturday, 6 a.m. to 4 p.m., with two hours and a half for meals. For children, employment is not allowed on the alternate day system, but only in morning and afternoon sets. The sets run from 6 a.m. to 1 p.m., and 1 p.m. to 8 p.m.; the Saturday afternoon set is from 1 to 4. The child cannot be employed in a morning set for two successive weeks, and the same holds good of afternoon sets. To secure a Saturday holiday, a child who has been employed before 1 p.m. on any day must not be employed before 1 p.m. on the Saturday of that week; nor must he be employed on Saturday afternoon if he has been employed on any other afternoon of the same week. This is the legislative way of securing time for recreation to all children employed in workshops of the smaller kind.

#### OVERTIME.

**Class I.**—One of the chief peculiarities of the law relating to textile factories is that there is no overtime employment of women, children, and young persons allowed. In certain non-textile factories and workshops a limited amount of overtime may be worked. It is important to note the difference between the power to employ women overtime, which is considerable, and the power to employ young persons and children overtime, which is very little. In factories and workshops—of which a list is given below—women may be employed from 6 a.m. to 8 p.m., or 7 a.m. to 9 p.m., or 8 a.m. to 10 p.m., allowing at least two hours for meals, of which half an hour must be after five in the evening. These long hours must not be more than three days in one week, nor more than thirty days in any twelve months. The principle upon which the exceptionally long hours are allowed is that there are certain trades where the material is liable to be spoiled by weather. In other cases—such as almanac-making—press of work arises at certain seasons of the year. In other businesses there may be a sudden press of orders arising from unforeseen events, such as in a millinery workroom. The Act of 1878 specified a large number of factories and workshops where such overtime might be worked, and a discretion was given to the Home Secretary to extend the privilege to other non-textile factories or workshops or parts thereof. By the Act of 1883 the thirty days do not apply to each individual woman, but to the factory as a whole; so that if on thirty days in the year, one or more women have been employed overtime under this section, there can be no more women's overtime in that factory or workshop during the twelve months—even though the same women are not employed.



*List of factories and workshops where overtime is limited.*

(1) Where the material which is the subject of the manufacturing process or handicraft is liable to be spoiled by weather, namely—

- (a) Flax scutch mills;
- (b) A factory or workshop, or part thereof, in which is carried on the making or finishing of bricks or tiles not being ornamental tiles; and
- (c) The part of rope works in which is carried on the open-air process; and
- (d) The part of bleaching and dyeing works in which is carried on open-air bleaching or Turkey-red dyeing; and
- (e) A factory or workshop, or part thereof, in which is carried on glue-making; and

(2) When press of work arises at certain recurring seasons of the year, namely—

- (f) Letterpress printing works;
- (g) Bookbinding works; and a factory, workshop, or part thereof, in which is carried on the manufacturing process or handicraft of—
- (h) Lithographic printing; or
- (i) Machine-ruling; or
- (k) Firewood cutting; or
- (l) Bon-bon or Christmas-present making; or
- (m) Almanac making; or
- (n) Valentine making; or
- (o) Envelope making; or
- (p) Aërated-waters making; or
- (q) Playing-card making; and

(3) When the business is liable to sudden press of orders arising from unforeseen events, namely, a factory or workshop, or part thereof, in which is carried on the manufacturing process or handicraft of—

- (r) The making up of any article of wearing apparel; or
- (s) The making up of furniture hangings; or
- (t) Artificial flower making; or
- (u) Fancy box making; or
- (v) Biscuit making; or
- (w) Job dyeing; or
- (x) Die-sinking; or
- (y) Cardboard making; or
- (z) Paper colouring and enamelling; or
- (aa) Rolling of tea-lead.

The occupation of—

- (bb) The making of gas-holders, boilers, and other apparatus, partly manufactured in the open air.
- (cc) Dressing floors;  
Tin streams;  
China clay pits; and  
Quarries
- (dd) Non-textile factories in which the only processes carried on are the processes of calendering, finishing, hooking, lapping, or making up and packing any yarn or cloth, or any of such processes.
- (ee) Workshops wherein the manufacture of fireworks is carried on.

} in the county of Cornwall

- (ff) The making of pork pies.
- (gg) The processes of warping, winding, or filling, or any of them, as incidental to the weaving of ribbons in workshops.
- (hh) The processes carried on in non-textile factories of calendering, finishing, hooking, lapping, or making up and packing, of any yarn or cloth, or any of such processes, and none other, but not if such process is carried on in any bleach works or dye works in Lancashire or Cheshire.
- (ii) Such parts of non-textile factories as are used for the carrying on of the occupation of milling, perforating, or gumming Inland Revenue stamps and postal stationery.
- (kk) Non-textile factories wherein the manufacture of fireworks is carried on.

**Class II.**—There are other factories and workshops where it may be so desirable as to be almost necessary for all hands to work overtime in order to finish an incomplete process; and it is open to any manufacturer whose trade does not come within the list given at the end of this paragraph to apply for it to be put in the list. Such an application should be made to the Home Secretary. In the factories and workshops in the subjoined list, women, children, and young persons may be employed for thirty minutes' overtime where the process on which they are employed is in an incomplete state. But if half an hour is added one day, it must be taken off some other day in the same week, so that the women, children, and young persons are not employed more than their ordinary number of hours in any one week. This is quite unlike the overtime in Class I., which only applies to women, and is really an addition to the hours of work; while Class II. is only adding to one day and taking off from another.

*List of factories and workshops where additional half-hour may be worked.*

- (a) Bleaching and dyeing works;
- (b) Print works;
- (c) Iron mills in which male young persons are not employed during any part of the night;
- (d) Foundries in which male young persons are not employed during any part of the night; and
- (e) Paper mills in which male young persons are not employed during any part of the night.
- (f) Bread- and biscuit-baking factories and workshops.
- (g) Dressing floors;
- Tin streams;
- China clay-pits; and
- Quarries

} In the county of Cornwall.

**Class III.**—In certain cases where the articles or materials worked upon in non-textile factories or workshops are perishable, women may be employed from 6 a.m. to 8 p.m. or from 7 a.m. to 9 p.m., for not more than five days in any week, nor more than sixty days in any twelve months. In reckoning the sixty days, every day in which women are worked overtime in the factory or workshop is to be taken into account. That is to say, you do not take each individual woman's time, but overtime as applied to the factory or workshop. Thus, if even a single woman is employed overtime under this class, the day on which she is so employed must be reckoned, leaving fifty-nine other days in which overtime may be worked in the factory. I give a list on next page of the works to which this section applies. Note that the Home Secretary has power by an order published



in the *Gazette* to add other trades to the list, provided he is convinced that the overtime will not be injurious to the health of women employed in these trades.

*List of factories and workshops in Class III. (perishable articles).*

Factories or workshops or part thereof in which any of the following processes is carried on, namely:—

- (a) The process of making preserves from fruit ;
- (b) The process of preserving or curing fish ;
- (c) The process of making condensed milk ; or
- (d) Preparing cream, and making butter and cheese.

**Class IV.**—Factories driven by water-power are liable to be stopped by drought or flood ; and power was given to the Home Secretary under the Act of 1878 to give a special exemption to such factories to work overtime so as to recover lost time. By the order made under the section, factories in which water-power is alone used may employ young persons and women (not children) for a certain number of days from 6 a.m. to 7 p.m. When the time is lost by drought, ninety-six days are allowed in twelve months ; where stopped by flood, only forty-eight days. Only the time actually lost within the previous twelve months may be recovered. There is to be no Saturday overtime and no curtailment of meal hours. Moreover, any manufacturer who proposes to take advantage of this section must give notice to the district factory inspector within three days of any loss of time, and state whether caused by drought or flood. He must also inform the inspector day by day as the lost time is recovered.

#### NIGHT WORK.

Women and children can never be employed during the night in factories and workshops, neither may female young persons. But male young persons over fourteen may be employed at night in *blast furnaces, iron mills, letterpress printing works, and paper mills*. The period must not exceed twelve consecutive hours ; meal times must be allowed the same as in non-textile factories ; the young person shall not be employed during any part of the twelve hours preceding or succeeding his night work ; and shall not be employed at night more than six days a fortnight (seven days, blast furnaces and paper mills).

There is another class of cases in which the Home Secretary, by a proclamation in the *Gazette*, may allow young male persons over sixteen (note the raising of the age) on night work, subject to the above rules as to hours, meal times, and working alternate weeks in day and night shifts. The trades already licensed by the Home Secretary for this purpose are given below, but any manufacturer can apply for the section to be applied to his factory. And he may succeed in getting the licence if he proves to the Home Secretary's satisfaction that (1) it is necessary, by the nature of the business requiring the process to be carried on through the night, to employ male young persons over sixteen at night ; and (2) that those male young persons will not suffer in health by the night work.

An alteration was made in the law as to night work by the F.A., 1895. Section 38 provided that instead of twelve-hour shifts at night in one week, followed

by day shifts the next, the male young persons comprised in the last two paragraphs may be employed in eight-hour shifts—that is, there must be practically three gangs, each working eight hours in the day of twenty-four hours. The male young persons who work in the first gang must not be employed again until two other shifts of eight hours have been worked.

*Places and occupations where male young persons over sixteen may be employed at night.*

- (a) Oil and seed crushing mills (factories).
- (b) Copper and yellow metal rolling mills.
- (c) Iron and metal tube works in which the furnaces used are Siemens' gas furnaces.
- (d) The knocking out and cutting departments of non-textile factories engaged in the refining of loaf sugar.
- (e) Such parts of mineral dressing floors in Cornwall (whether non-textile factories or workshops) as are appropriated to the processes of calcining and stamping.
- (f) The process of galvanising metal in non-textile factories.
- (g) Iron and metal tube works in which furnaces are used.
- (h) China clay works.
- (i) The process of iron ore washing.

**Overtime and overcrowding.**—I shall deal with the subject of overcrowding when I come to the sanitary arrangements of the works; but it should be mentioned in connection with the subject of overtime that more breathing space is to be allowed to persons working overtime than to those doing the ordinary day's work. The reason, obviously, is that women, young persons, and children working overtime are more likely to be tired, and consequently more susceptible to the evil results of breathing contaminated air. A second reason seems to be that although overtime is allowed in some cases, yet overtime is not to be encouraged; and consequently a manufacturer whose place is packed to the utmost limits of the law (250 cubic feet of space per person) in the working-day time, cannot keep all his hands on to work overtime. For a manufacturer is liable to the penalties for overcrowding if the room in which workpeople are working overtime does not allow 400 cubic feet of space for each person so employed.

The Home Secretary has power to vary this condition by an order published in the *Gazette*, either by requiring more space to be given to the worker, or allowing less during any period when artificial light (other than electric light) is used for illuminating purposes.

**Working "spells" in some textile factories.**—In the factories named at the top of next page, the manufacturer may keep women, young persons, and children at work for a five-hours' spell without interval for rest or a meal. The rule in ordinary textile factories is that no woman, young person, nor child shall be kept at work more than four and a half hours at a stretch without at least half an hour's interval. And the exception allowed by this section is based either upon the nature of the work or upon local custom. The Home Secretary has power to add to the list any works where some process is carried on that would be likely to spoil unless these spells were permitted; or where by local custom it is usual for the workers to work in spells. But these five-hours' spells can only be in the



winter months, between the 1st of November and the 31st of March; and work must not begin earlier than 7 in the morning. Moreover, the first hour (*i.e.* 7 a.m. to 8 a.m.) must be allowed for breakfast; so that practically work begins at 8 and can be carried on until 1 p.m. without a break.

*List of textile factories where five-hours' spells are allowed in winter.*

Factories used solely for—

- (a) The making of elastic web
- (b) The making of ribbon.
- (c) The making of trimming.
- (d) Hosiery factories.
- (e) Winding and throwing raw silk, or either of such processes.
- (f) Woollen factories in the counties of Oxford, Wilts, Worcester, Gloucester, and Somerset.

Works where the **employment of children and young persons** is either **totally forbidden or still further restricted**:—There are some factories and workshops where the work is so unhealthy that the Legislature has restricted still further the employment of the two protected classes. You will see from the list given below that in some cases the restriction only applies to the part of the works where the unhealthy process is carried on; in others, to the whole works. You will also see that in some cases the restriction is more stringent in the case of female than of male young persons, and in the case of children than of young persons. There appears to be no power in the Home Secretary to increase the list of restricted places.

*List of works affected by this section.*

"A child or young person" is not to be employed where there is carried on "the process of silvering mirrors by the mercurial process; the process of making white lead."

"A child or female young person" is not to be employed in the part of a factory in which the process of melting or annealing glass is carried on.

"A girl under the age of sixteen years" is not to be employed in a factory or workshop where there is carried on (a) the making or finishing of bricks or tiles not being ornamental tiles; or (b) the making or finishing of salt.

"A child" is not to be employed where there is carried on (a) any dry grinding in the metal trade; (b) the dipping of lucifer-matches.

"A child under the age of eleven years" is not to be employed in (a) any grinding in the metal trades other than dry grinding; or (b) in fustian cutting.

**Time and place for meals.**—All children, young persons and women, are to have times allowed for meals at the same hour of the day; and during such meal time no child, young person, or woman is to be employed in the factory (except as stated on p. 699). More than this, no child, young person, or woman is to be allowed to remain in a room where a manufacturing process or work is being carried on during meal times. There are some works also where the trade carried on is of such a kind that the taking of meals in certain parts of them would be specially injurious to health, because of particles of deleterious matter flying about—even when no work is being done at the time. And in these places—a list of which is given at the top of next page—women,

children, and young persons are forbidden to take a meal or remain during meal times. The list may be extended by the Home Secretary by a notice in the *Gazette*; and the manufacturer must put up a notice of the prohibition in the factory or workshop to which it applies.

*Places forbidden for meals.*

- (a) Glass works: any part in which the materials are mixed.
- (b) Glass works where flint glass is made: any part in which the work of grinding, cutting, or polishing is carried on.
- (c) Lucifer-match works: any part in which any manufacturing process or handicraft (except that of cutting the wood) is usually carried on,
- (d) Earthenware works: any part known or used as dipper's house, dipper's drying room, or china scouring-room.
- (e) Every part of a factory or workshop in which part wool or hair is sorted or dusted, or in which rags are sorted, dusted, or ground.
- (f) Every part of a textile factory in which part gassing is carried on.
- (g) Every part of a bleach-work, print-work, or dye-work in which part singeing is carried on.
- (h) Every part of a factory or workshop in which part any of the following processes are carried on:—

Grinding, glazing, or polishing on a wheel.

Brass-casting, type-founding.

Dipping metal in aquafortis or other acid solution.

Metal-bronzing, majolica painting on earthenware.

Catgut cleaning and repairing.

Cutting, turning, polishing bone, ivory, pearl-shell, snail-shell.

Every factory or workshop in which white lead is manufactured, except any room thereof used solely for meals.

Every part of a factory or workshop in which part dry powder or dust is used in any of the following processes:—

Lithographic printing, playing-card making, fancy box making.

Paper staining; almanac making.

Paper colouring and enamelling; colour making.

**Meal times need not be simultaneous, and meals may be taken in the workroom** in a few cases specially exempted by section 52 of the F.A., 1878. In the following factories meal times need not be allowed at the same hour of the day:—

Blast furnaces, iron mills, paper mills, glass works and letterpress printing works (women, children and young persons); and (as to male young persons only) print works or bleaching and dyeing works in which open-air bleaching is carried on.

And in the following cases meals are allowed to be taken in a room where some process of manufacture or handicraft is being carried on:—

- (a) Iron mills; (b) paper mills; (c) glass works (save as otherwise provided by this Act); and (d) letterpress printing works.
- (e) And as to male young persons only, in print works or dyeing and bleaching works where the process of dyeing or open-air bleaching is carried on, such male young person may be employed during the times allowed to other young persons, women or children, for meals. And while this young person is at his meals, other young persons or women or children may be employed.



- (f) Textile factories wherein young persons or women employed in a distinct department in which there is no machinery commence work at a later hour than the men and other young persons, subject to the condition that all in the same department shall have their meals at the same time.
- (g) Non-textile factories and workshops wherein is carried on the making of wearing apparel.
- (h) Non-textile factories and workshops wherein there are two or more departments or sets of young persons, subject to the condition that all in the same department or set shall have their meals at the same time ;
- (i) The following non-textile factories and workshops, namely :—  
Dressing floors, tin streams, china clay-pits, and quarries in the county of Cornwall.
- (k) Non-textile factories where the making of bread and biscuits by travelling ovens is carried on.

**Women after childbirth: A legal curiosity.**—An occupier of a factory or workshop shall not knowingly allow a woman to be employed there within four weeks after she has given birth to a child (F. A. 1891, s. 17). Now, the Factory Acts define "woman" to mean "a woman of eighteen years of age and upwards"; so that, although it is illegal to allow a woman of more than eighteen years of age to work within the four weeks, it is not unlawful so to employ a young mother who is under eighteen. This is an anomaly and is no doubt due to oversight on the part of the framers of the Act of 1891. I am not aware whether the slip is taken advantage of by manufacturers or workers; but there is, especially in the North of England and the East End of London, a large class of workwomen who achieve maternity before they are eighteen years old. It should be observed that by the Act of 1895 (s. 22) the prohibition is extended to women who work in laundries.

**Children—Half-timers—Education—School Attendance Certificates.**—No child under eleven years of age can "be employed" in a factory or workshop. A curious question once arose as to what was meant by "being employed." A child of between seven and eight years of age was sent to the house of one Parrott, who kept a curious kind of school, partly educational and partly technical, in which young children were taught to read and to make straw plait. The child's mother paid threepence a week to Parrott and provided the straw for the plaiting; and any straw plait made was taken home. That is, Parrott did not take the benefit of the child's work. He was merely an instructor. For this reason Parrott contended that he did not "employ" the child; but the judges held that he did. The object of the Act was, their lordships said, to prevent children under the proper age from working under any pretence.

Children between eleven and fourteen are allowed to be employed as half-timers (*see* p. 692); and they are the persons referred to as "children" in the Factory Acts.

Parents of children employed in factories and workshops are under a legal obligation to see that their children attend some recognised efficient school (*i.e.* a school subject to Government inspection). If the child is employed in the morning and afternoon set system he must attend school once on each work-day. If he is employed on alternate days he must attend school on the other days, both morning and afternoon, except that he need not go to school

on Saturdays, nor on any half-holiday allowed in the works by virtue of the Factory Acts. And where the child lives more than two miles from a "recognised efficient" school, he or she may be allowed to attend any other school allowed by the factory inspector. An "attendance" at school must be for not less than two hours in secular subjects. To secure the co-operation of the employer in this matter, and to prevent any employer from pleading that he thought the child was receiving education when this was not the fact, every employer is bound to procure every Monday from the school a certificate of attendances for the preceding week. And if such a certificate be not forthcoming, or if it shows that the child was absent from school without due and proper excuse (*e.g.* illness, or some reason of religion, such as keeping a child away from school to attend church on Ascension Day), the employer is guilty of an offence against the Factory Act if he continue to employ the child. And every employer is bound to keep every attendance certificate for two months after its date and produce it to the factory inspector when desired. A further proviso in the same direction is one that the school board or managers of the school where the child attends can compel the occupier of the factory to pay the child's school fees direct to them and stop them from the child's wages.

**Proficient children.**—As I have said in the first paragraph of this subsection, a child becomes a "young person" at fourteen. But he may become one earlier than that, and so be entitled to work full time. For when a child of thirteen has obtained from a person authorised by the Education Department a certificate of having passed a certain standard of proficiency, he becomes a "young person." The standard may be altered from time to time; but at present it is Standard V., including (in England) reading a passage from some standard author, or a reading-book or a history of England; writing from memory the substance of a short story read out twice—spelling, handwriting, and correct expression to be considered; arithmetic—practice, bills of parcels and rule of three, addition and subtraction of proper fractions with denominators not exceeding 12. In Scotland the requirement is, Standard V. of the Scottish code as to reading, writing, and arithmetic. In Ireland the pass is, "reading intelligently any passage from the Fourth Book of Lessons, or a book of equal difficulty; writing in small hand eight lines dictated slowly from a reading-book—spelling and writing to be considered; arithmetic—compound rules (money) and reduction of weights and measures,"—altogether a lower standard than in Scotland and England, except that the Irish lad or lass must read "intelligently," while the British child may apparently read as stupidly as he likes, provided the words are read correctly.

Besides the educational certificate, the thirteen-year-old must produce a certificate of attendances at school. The certificate must show that the child has attended at least 250 times a year for five years, at not more than two schools in each year. And the five years need not be the years immediately before the child reaches thirteen, *i.e.* from eight to thirteen, but may be any five years since the child was five years old. Thus, if a boy of thirteen applies in 1897 to be taken on as a "young person," his certificate of attendances will be good if he shows that he has attended 250 times a year for any five



years since 1889. So that if in 1889, 1890, 1893, 1895, and 1896 he attended properly, the employer is not concerned with 1891, 1892, and 1894, the years when his attendance was irregular. In Ireland the rules are the same as the above, except that 200 attendances are sufficient instead of the 250 required in the sister islands.

A great difference between factories and workshops is that in workshops children and young persons may be taken on without regard to their physical fitness for the work; while in **factories** the employer must get from the certifying surgeon of the district a **medical certificate of fitness** for the employment in the case of all children (eleven to fourteen), and also young persons under sixteen. The certifying surgeon must be satisfied by a birth certificate or other evidence that the boy or girl in question is of age stated, and also that he or she is not incapacitated by disease or bodily infirmity for working the daily time allowed in the factory. If a surgeon refuses to certify, the employer can demand that he shall give his refusal and his reasons in writing. The certificate of fitness, unlike the certificates of education and school attendance, is not required before the boy or girl is engaged, but it must be obtained within seven days after work is begun, or thirteen days if the certifying surgeon lives more than three miles away from the factory. And the examination of the young worker must take place at the factory itself unless the factory inspector allows otherwise. Moreover, when a child turns fourteen (or, being thirteen, obtains a certificate under Standard V. and a certificate of school attendances—*see last paragraph*), and so becomes a young person, a fresh certificate of fitness is required.

Besides this, an inspector may, even after the boy or girl has been certified as fit for work, require a fresh examination and certificate by the surgeon. This is to meet the case of a child who, though fit and healthy when first employed, afterwards contracts some disease or infirmity of body.

**Holidays** are now the right of every child, young person, and woman employed in factory or workshop. The regulation of these holidays, as to date, is left to some extent in the hands of the employer. There must be two whole holidays in the year, which are Christmas Day and Good Friday, unless the employer, in the first week in January posts up a notice substituting the two Bank Holidays next after Christmas Day and Good Friday. That is, in England and Ireland he may substitute Easter Monday for Good Friday, and Boxing Day instead of Christmas Day; and in Scotland he may choose New Year's Day and the first Monday in May. There must also be allowed eight half-holidays in the year, with the option to the employer to allow one whole day instead of two halves. The employer is to post up a notice in the factory in the first week in January, stating when these holidays are to be; and he can only change the dates by posting up a fortnight's notice in the works. And to prevent anything in the nature of evasion, or alteration of notices, any of the notices I have just named must be posted to the factory inspector the same day they are put up in the works. Half the holidays must be in the summer—that is, between March 15 and October 1.

Now, suppose no notice of dates of holidays and half-holidays should be

posted up by the occupier of the works—what happens? Well, the children, young persons, and women are entitled in England and Wales to the four Bank Holidays, in addition to Christmas Day and Good Friday; and if any of them are allowed to work, the “occupier” of the factory or workshop is liable to a fine not exceeding £3 per head of those employed; or £5 if employed at night. In Ireland, St. Patrick’s Day is a legal factory holiday, and either Good Friday or Easter Tuesday, instead of two Bank Holidays; and in Scotland, instead of Christmas Day and Good Friday, either the two sacramental fast-days of the year, or two days fixed by the magistrates or police commissioners, of which at least fourteen days’ notice must be publicly given.

These holiday rules do not apply to domestic workshops, nor to “young persons” employed on alternate day and night shifts. Moreover, the Home Secretary may allow, in certain classes of works, holidays to be given in sets—*i.e.* not to all on the same day. Those already so permitted are factories and workshops where is carried on (1) newspaper printing; (2) printing periodicals, railway time-tables, or law or parliamentary proceedings; (3) manufacturing connected with a retail shop on same premises—*e.g.* a saddler’s workshop and shop; (4) making wearing apparel or food; (5) making plate glass.

**Notice of hours and meal times.**—The occupier of the factory or workshop must put up in his place a notice of the hours of employment and meal times of the women, children, and young persons employed in his factory or workshop; and he must send a copy of the notice to the district inspector of factories. This notice must not be changed more than once a quarter without the inspector’s permission; and anyone who does not keep within the notice is liable to a fine of not more than £10. The notice must also state whether children are employed on the alternate day system or the morning and afternoon set system. These notices are not required in domestic workshops and factories (p. 691), and in tenement factories they are to be affixed by the “owner.”

#### THE SAFETY OF THE WORKPEOPLE.

The Factory Acts are particularly strict with regard to the safety of the workers, so far as safety can be secured by compelling the manufacturers to fence their machinery properly. In the first place, all **dangerous parts of the machinery must be securely fenced**; and so must every part of the mill-gearing; or else it must be in such a position or so constructed as to be equally safe as if it were fenced. The expression “machinery” includes any driving-strap or band; and it only applies when the machinery in the room is in motion for purposes of manufacturing. When a manufacturer is summoned under this section, he is quite safe if he can convince the magistrates that the part of the machinery left unfenced is not dangerous. A factory inspector once tried to persuade the Courts that it was his business to say whether the unfenced part was dangerous or not. But the judges were not of that opinion.

Every hoist or teagle and every fly-wheel directly connected with the power used, every part of any water-wheel or engine worked by the power, and every wheel-race not otherwise protected must be securely fenced. And this part of the section is quite independent of the question whether the machinery mentioned



is dangerous or not. In fact, there is a case on record where a man was fined for not fencing a fly-wheel though he proved up to the hilt that it was so situated as to make it almost impossible for any accident to happen.

The fencing must not only be put up, it must also be efficiently kept up; and can only be taken down where the machinery is being repaired or cleaned or the gearing altered, except, of course, when the parts required to be fenced are not in motion or use.

The **penalty** for not fencing properly is a fine of not more than £10. Besides this, **if anyone is injured**, or killed, the occupier of the factory may be fined up to £100, which money the Home Secretary may order to be applied to the benefit of the injured person or his family.

In *tenement factories* the "owner" is liable for the fencing of the machinery used in the building and all buildings situate in the same close or curtilage, except such parts of the machinery as are supplied by the occupier. In these factories, as a rule, the "owner" supplies the engine which drives the machinery. He also supplies the bands, fly-wheels and gearing by which the power is transmitted to the machines used in the actual process of manufacture. If the tenant supplies anything at all, it is only the last-mentioned machines; and that, as a rule, is not dangerous. It should be remembered that where an occupier pays a rent of more than £200 a year, he is liable, and not the owner. One of the reasons for this legislation is that the man who hires a room or part of a room in a building employing perhaps only one or two workmen is not in a position to compensate the latter if they should be injured by unfenced machinery. Moreover, the small employer is not the owner of the dangerous machinery; he only hires the use of a part of it, and it would be somewhat absurd to make him responsible for fencing machinery in which he had so slight an interest.

**Self-acting machines.**—In factories erected after January 1st, 1896, the traversing carriage of such machines must not run out within a distance of eighteen inches from any fixed structure which is not part of the machine, if the space over which it runs out is one over which any person is liable to pass. The penalty for infringing this rule is £10.

No employee may be allowed to be in the space between the fixed and traversing portions of a self-acting machine, unless the machine is stopped with the traversing portion on the outward run. The notion of this is to compel the employer to make his workmen desist from the dangerous practice of getting inside a machine that is at work. But the space in front of a self-acting machine is not included in the prohibition.

**Cleaning machinery in motion.**—A child must not clean any part of the machinery of a factory while in motion. A young person must not clean mill-gearing in motion. Moreover, a young person is not to be allowed to clean any dangerous part of the machinery while in motion. The inspector decides what parts are dangerous and notifies the same to the occupier of the factory; and it is then the employer who must prove that the parts are not dangerous if he is summoned. Women are only prohibited from cleaning mill-gearing; they may be employed to clean all other parts of the machinery

whilst in motion. The fine that may be imposed for breach of this section is a maximum of £3.

The man from Sheffield, who, we all know, has come in for a little bit of special attention from the Legislature in respect of the dangerous nature of his machinery, has been, since time when the memory of man runneth not to the contrary, a cutler. Whether it be that the waters of that sweet stream, the Sheaf, have a special virtue for the tempering of steel, or that your true cutler, like your poet or Vere de Vere, is born, not made, certain it is that even as no self-respecting housewife dreams of any other cutlery than the best Sheffield, so the Saxon of the tenth century did also think himself lucky if he had a Sheffield whittle wherewith to carve his foe or his food. For your free and independent Saxon had no change of knife, and used the same carver to hack the family pig and any friend with whom he might chance to have a slight difference of opinion. Now, to the making of cutlery goes much grinding. And to much grinding goes much dust. And sparks fly. Thus grinding is not the safest of trades; and, I am told by an honourable member for Sheffield, your grinder is not the most careful man in the world. Moreover, much grinding and cutlery is carried on by "little masters" in tenement factories.

Accidents by way of exploding grindstones and grindstones getting beyond control are of the commonest. They are very often due to the careless manner in which the drum-boards were fenced, and also to the neglect of the employer to keep his "scotchmen" in repair. Why belt-guards are locally termed "scotchmen," I cannot inform you. They are made of particularly tough leather. When a grindstone accident occurred in a tenement factory, there was frequently an ancient "scotchman" at the bottom of it. Should the injured man or his widow approach the employer for compensation, the application was generally useless, because the master was little, if any, better off than the man. The "owner" of the tenement factory is now made responsible to provide proper "scotchmen," to fence the drum-boards, to put hand-rails over the drums, to fence closely the sides of all drums in a grinding room or hull. And the "owner" is responsible to see that such parts as he supplies of the horsing chains, and of the hooks to which the chains are attached, are kept in efficient condition. There must also be kept an instantaneous communication between every grinding or cutlery room, and the engine-room and boiler-house. The reason is, that in case of accidents it is essential that the machinery should be stopped *instantly*. The fine for breach of these rules is £10.

**Ruinous and dangerous buildings and machines.**—The factory inspector has power to summon before the magistrates any occupier of a factory or workshop which is in such a condition that it is dangerous to the health, life, or limb of the people employed there. He has also power to summon the occupier when any machine used in the factory or workshop is in a dangerous condition. If the magistrates find that the complaint is well founded, they may prohibit the use of the building or machine until it has been repaired as the magistrates direct. Disobedience to the order entails a penalty of 40s. a day.

**Fire.**—All new factories built after the 1st of January, 1892, where more than forty persons are employed, must provide means of escape from fire to



the satisfaction of the local sanitary authority. The sanitary authority must examine the factory and give a certificate, if satisfied. In old factories where more than forty persons are employed, the sanitary authority is to make an inspection and compel the "owner" (*see* p. 707) of the building to provide means of escape. Besides this, the factory inspector may summon the occupier of a factory before the magistrates [Scotland, Sheriff's Court] and compel him to provide movable fire-escapes. As a further precaution, all newly-built factories must have their doors to open outwardly. And lastly, workpeople must not be locked in so that the doors cannot be easily unfastened from the inside of the room.

#### THE SANITATION OF THE FACTORY OR WORKSHOP.

Hitherto I have dealt with provisions for the protection of those whom we may call the privileged classes—women, children, and young persons—against excessive work unsuited to their age or sex. The provisions now to be noticed are those for the benefit of the health of all the workpeople and of the community; for an unhealthy factory or workshop is dangerous to the community, because it serves as a focus and centre for disease. The first requirement is that of

**Cleanliness**, which may be defined as keeping the factory or workshop cleanly and free (especially) from smells and fumes arising from drains, closets, privies, and other such conveniences. By way of special directions for keeping the workplace clean, the Factory Acts compel the occupier of a *factory* to limewash the inside walls of the rooms, the ceilings and tops of rooms, passages, staircases (unless painted or varnished within seven years), once at least in every fourteen months; and the same parts must be washed with soap and hot water once every fourteen months. The Home Secretary has exempted (1) alkali works, (2) blast furnaces, (3) breweries, (4) cement and (5) chemical works, (6) copper mills, (7) distilleries, (8) foundries, (9) flax scutch mills where neither children nor young persons are employed and which are worked intermittently for not more than six months in the year, (10) glass factories, (11) iron mills, (12) manure works, (13) paint, colour, and varnish works, (14) stone and marble works, (15) sugar factories, (16) works in which there are no glass windows, from the obligation to limewash and wash every fourteen months.

With regard to *workshops* there is no fixed rule, except that the local sanitary authority may call on the occupier or "owner" to wash, purify, and limewash whenever they think it necessary for the health of the workers or the neighbourhood.

With regard to *tenement factories* the "owner" is liable to wash and limewash the engine-house, passages, staircases, and rooms let to more than one tenant. The second requirement is

**Space**—that is, no overcrowding. There must be allowed 250 cubic feet for each person employed in the room, and 400 cubic feet if they are working over time. And the occupier must put up a notice at the entrance of each room stating how many may legally be employed there. Then

**Ventilation** must be provided so as to render harmless, as far as possible,

any gases, vapours, dust, and other impurities that may be injurious to health. And in any factory or workshop where grinding or polishing or glazing on a wheel is carried on, so that dust is generated, the inspector may require a ventilating-fan to be put up; and the like where injurious gas or vapour is generated. The ventilating and heating apparatus must be so regulated as to keep up a reasonable temperature in the room—reasonable, that is, according to the nature of the work.

The **enforcement of these rules** is in the hands of the factory inspector as far as factories are concerned, and of the local sanitary authority in the case of workshops. But if the local sanitary authority fails to do its duty, the Home Office may put the matter in the hands of their district factory inspector, and order him to prosecute offenders. The **penalty** is £10 for a breach of any of the sanitary regulations, or less if the magistrates [or sheriff] choose, and perhaps costs. A very important point for the manufacturer to consider is

**Who is responsible** for a breach of the law in this regard? Well, the rule is that the tenant or occupier of the factory or workshop is responsible; but with regard to tenement factories (*see* p. 704) the “owner” is liable for uncleanness, and for overcrowding, and for bad ventilation. By “owner” is meant not necessarily the person to whom the factory belongs, but the person to whom the occupier pays the rent. For instance, Mulligan owns an empty factory. He lets it to Jameson for £300 a year. Jameson fixes up “power” and gearing, and lets out the factory in rooms, with power. For example, he lets to Smith two rooms with 3 horse-power (*i.e.* force enough to drive a 3 horse-power machine) at £10 a month; to Brown, one room and so much power at £7 a month; and so on. Jameson is the “owner” of this tenement factory within the meaning of the Factory Acts. And it should be remembered that as to workshops, which come as to sanitary requirements under the Public Health Acts, just as private houses do, the sanitary authority can always drop on the “owner” in the above sense. Curiously enough, too, the “owner” need not be receiving the rents for himself. Thus, Thompson hires a building from Johnson for £100 a year, and lets it out in rooms as workshops to twenty people. Thompson puts the letting into the hands of Smith, an agent [factor], who collects the rents. Smith, as well as Thompson, is the “owner,” of the building. The reason is, that if the man who actually received the rent were not made responsible, public justice might be defeated; because if Smith were allowed to go free on the ground that he was only an agent, you might be unable to find the real “owner,” for Smith would not tell you, and no one else would be likely to know. But if Smith knows that he can be summoned, he will tell you readily enough.

It should also be said that the provisions as to cleanliness, overcrowding, and ventilation do not apply to a domestic workshop, unless it be a bakehouse. Bakehouses, too, must be washed and limewashed every six months instead of every fourteen; except that bakehouses in villages or towns of less than 5,000 inhabitants at the last census are altogether exempt from sanitary regulations under the Factory Acts.

**Sending work out to an unhealthy house.**—In many trades a good



deal of work is given out by the employer to be done at the worker's home. Especially is this so in the tailoring and allied trades; and the section of the Act to which I am about to draw attention is aimed at those trades, though it may apply to others. Gruesome are the stories one sometimes hears of the man and wife and daughter who sit sewing until far into the night at a suit that is to be worn on the morrow by a noble lord at some great function. Meanwhile, in their one apartment that serves for work-room, living-room, and sleeping-room, a child lies on a bundle of rags in the corner burning with fever. And the noble lord, when he dons his suit next day, is blissfully ignorant of the fact that he carries with him and spreads amongst his friends the germs of a malignant disease.

By section 6 of the Factory Act, 1895, a fine not exceeding £10 may be imposed for giving out work which is either making, or cleaning, or repairing wearing apparel to be done in a dwelling-house or building occupied with a dwelling-house, where any inmate is suffering from scarlet fever or small-pox. There are three classes of people dealt with, namely—(1) the occupiers of factories, workshops, and laundries; (2) the occupiers of any place whence work is so given out; and (3) any contractors employed by such persons. And when the factory inspector proves that wearing apparel was being worked upon in a house where small-pox or scarlet fever was raging, it is for the person who gave out the work to clear himself by proving that he didn't know, and had no reason to believe, that the disease existed at the house.

By another section (5) of the same Act a penalty is provided for manufacturers who give out work to be done in a place that is notified to them by the inspector to be dangerous to the health of the workers. But the good such a section might effect is stultified by the fact that it can only be applied to such classes of work, in such districts as the Home Secretary proclaims in the *Gazette*.

### THE SALE OF GOODS.

**Quality or fitness.**—I have stated in the previous chapter (p. 671), that when the buyer of goods makes known to the seller the purpose for which he wants them, so as to show that he depends on the seller's skill or judgment, there is an implied condition that the goods supplied are reasonably *fit for the purpose for which they are supplied*. This condition applies with especial force to manufacturers, for a manufacturer frequently receives an order to make a specific article, the customer adding, "I want to use it for so-and-so." Thus, a Mr. Bright, who received an order for copper intended to be used for the sheathing of a vessel, supplied copper sheathing that was no good to the shipbuilder for his purpose. The shipbuilder was held entitled to reject the copper (*see* p. 674 as to what constitutes rejection). Had the shipbuilder paid for the copper he could have got his money back, or he would have been entitled to keep the stuff and claim a deduction for defective quality. The same in the case of a carriage-maker who supplied a defective carriage-pole. It was held that he warranted the pole to be fit for use in the particular kind of carriage for which it was ordered.

But if anyone orders from a manufacturer an article that goes by a patent or

trade name, even though the customer says he wants it for a particular purpose, the manufacturer does not guarantee the article to be fit for that purpose. For example: Mr. Hopkins wrote to Mr. Chanter, a manufacturer, "Send me a Blank (patent) printing-machine." Chanter sent one, but the machine would not print; whereupon Hopkins wanted to return it and have his money back. But when Chanter proved that he had sent what was ordered, Hopkins's claim failed. Had he ordered simply "*a* printing-machine," and Chanter had forwarded a machine that would not print, Hopkins could have rejected the worthless article. But when he ordered a particular patent machine and got it, what had he to complain of?

There is also a condition that the goods are of **merchantable quality**; by which is meant that they are saleable on the market. This is when goods are sold by description, and the buyer has not examined them. If he has examined them, the manufacturer is only responsible so far as the defect could not be discovered by such an examination. For example, if a merchant orders by post a thousand yards of blue pilot cloth from the woollen manufacturer, naming the price, and the manufacturer sends cloth with a flaw in it, or not properly finished, the merchant may refuse to take it, because it is not saleable. He may therefore write to the manufacturer requiring him to take back the cloth, and announcing an intention to charge for warehousing it. But if the merchant comes to the factory and asks to be shown some blue pilot cloth, and a bale is shown of badly-finished stuff, such as the buyer ought to see is badly finished, and he agrees to take some of it, he cannot afterwards complain of the bad quality.

And even when **a manufactured article is sold by sample**, it must be of merchantable quality, unless the defect was discoverable by a fair examination of the sample. Thus, grey shirtings were ordered by Blank from Asterisk, to be of the same quality as a sample exhibited by Asterisk's traveller. Grey shirtings were delivered, of the same quality as the sample; but it turned out that the fabric contained 15 per cent. of china clay (to add to the weight), which rendered the shirtings unmerchantable. Blank brought an action for damages against Asterisk on account of the bad quality of the goods supplied, when Asterisk pleaded that as Blank ordered per sample, and as the bulk corresponded with the sample in quality, Blank had no good ground of complaint. But Blank proved that you could not tell by looking at a small sample that the cloth was adulterated to such an extent; and on this the Court found for Blank. For the buyer is not bound to have the sample chemically analysed, and he only accepts the quality if the sample is really capable of informing him, on a reasonable examination, of the full quality of the bulk.

In sale by sample there is also a condition that the buyer cannot be called on to accept the goods finally until he has had a chance of comparing the bulk with the sample; and there is another condition that the bulk shall be up to the sample. The safest way to do is to take your sample out of bulk. In some trades—for instance, cottons and woollens—this is possible, but not in many others. But in any case where the goods supplied are not up to sample, the customer may either reject them altogether and refuse to pay,



or take what is sent to him and bring his action for damages for the difference in quality.

It often happens that a customer goes to a manufacturer with an idea, which idea the manufacturer agrees to carry out. He shows the customer a sample of something used for a different purpose, and asks, "This is the sort of thing you want?" And the customer says, "Yes: that sort of thing, but with the alteration in pattern and design that I have mentioned." Suppose the sample shown has some defect in it which would interfere with the proper use of the manufactured article for the purpose for which it is ordered, and the manufacturer delivers an article up to sample in quality, but unfit for the customer's purpose, can the customer reject the article, or keep it and sue for damages, or must he accept what is sent without demur? In a case of this kind, Lord Macnaghten said, "When a manufacturer proposes to carry out the ideas of his customer, and furnishes a sample to show what he can do, surely, in effect, he says, 'This is the sort of thing you want, the rest is my business; you may depend upon it that there is no defect in the manufacture which would prevent goods made according to that sample from answering the purposes for which they are required.' As against the manufacturer, I think it must be taken that the sample is *free from all hidden defects of manufacture which would interfere with the proper use of the manufactured article*. If the manufacturer supplies goods corresponding with the sample, out free from all such defects, he fulfils his bargain." And in the same case Lord Herschell said, "I think he [the customer] has a right to rely on the samples supplied representing a manufactured article which will be fit for the purpose for which such an article is ordinarily used." In other words, the quality of the bulk to be supplied is only to be judged by the sample shown so far as the sample is capable of revealing the quality of the manufactured article. And the manufacturer also undertakes to supply something fit for the customer's special purpose so far as he, by his skill as a manufacturer, can make it fit.

**Sale of goods to be made.**—The Sale of Goods Act, 1893, says: "The goods which form the subject of a contract of sale may be either existing goods, . . . or goods to be manufactured or acquired by the seller, . . . in this Act called 'future goods.'" And a subsequent section declares that "Where there is a contract for the sale of future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer." And it goes on to declare that the assent need not be in so many words, but may be implied, and may be given either before or after appropriation. To show how this applies to a manufacturer, let us consider the case of Green, who ordered Smith, a mechanical engineer, to make him a machine, and paid a deposit of £4. Smith made a machine of the required kind, and wrote to say that Green's machine was completed. Green replied by remitting a further instalment of £2. The question afterwards arose whether Green was the owner of the machine, and it was decided that he was, for these reasons: When Smith finished the machine

he set it on one side as the article made to Green's order—this is called in the Act “appropriating the thing to the contract”—and Green agreed to this by sending the £2—which the Act calls “the assent of the buyer.” Now, suppose I go to a carriage-maker's in Long Acre and say, “Build me a dog-cart of such a description.” And I even pay for it before it is made, and the carriage-builder proceeds to build a dog-cart, intending to fulfil my order. And after it is finished the carriage-builder goes bankrupt, without having signified to me that the cart in question is finished ready to my order. What is my position? The carriage is not mine, because it has not been “appropriated to the contract” with my assent and the seller's. Whereupon I can only put in a claim for a dividend on the money paid in advance, and the dog-cart will be sold for the benefit of the creditors. But suppose the worthy carriage-builder had put a ticket on the vehicle: “Mr. Loryer's dog-cart,” or something to that effect, the case would be different. For I could come in and assent to the appropriation, the dog-cart would be mine, and the bankruptcy would in no way hurt me.

The moral is, that when a manufacturer sets aside an article ordered to be made as the particular article to satisfy that order, and the customer assents, the article becomes the property of the customer, though it has never been delivered to him.

For the remedies of a seller who has not been paid, see the last chapter (p. 675) and the next chapter.

**“Our own manufacture.”**—It used to be held in England, but not in Scotland, that when anyone bought from a manufacturer goods of the kind that it was his business to make, the manufacturer guaranteed the goods to be of his own manufacture. But this rule appears to be now repealed by the Sale of Goods Act, 1893, s. 14. There is, however, a certain amount of protection given to purchasers under the Merchandise Marks Act, 1887, by way of securing that when they send to Green of Sheffield, cutler, for knives, Mr. Green does not send them goods made by Baffenheim of Germany. That Statute enacts that when goods to which any trade mark or trade description has been applied are sold, the seller warrants the mark or description to be genuine, unless he delivers to the buyer a signed document to the contrary. A trade mark means a registered trade mark; and a trade description may refer to the quantity, place of origin, mode of manufacture, or material. The Act works in this way: Suppose the goods bear the name and address of the manufacturer who sells, they are to be taken as warranted of his own make. If they are marked or labelled “Dundee,” they are warranted made at Dundee. If they bear a trade mark, they are warranted to be made by the person whose trade mark they bear, and there is also a warranty that the trade mark is genuine.

Should this kind of warranty be broken, the buyer has a right of action for damages in England and Ireland, and it is thought that in Scotland he may return the goods and demand his money back. There are cases, however, in which the name of a person or a place is commonly used in trade to denote a particular kind of goods, not the name of the maker nor the place of manufacture. Thus, no one supposes that a Gladstone bag is intended to be sold as a bag made by Mr. Gladstone, nor does anyone imagine that Brussels carpets are made in



Brussels, nor cashmere cloth in the Indian province of that name. Therefore, the Merchandise Marks Act does not prohibit the application of such names to the goods they are used to describe in the trade.

#### PATENTS AND TRADE MARKS.

A **Patent** is a right in the nature of a monopoly granted by the sovereign to secure to the inventor of a new and useful invention "any manner of new manufacture which others at the time of making such letters patent shall (*i.e.* do) not use." This does not limit patents to new articles, for it applies equally to a new way of manufacturing an old article. Nor does it mean merely an idea, for you cannot patent an idea. It means also the carrying out of an idea; either the application of an old idea in a new way, or the application of a new idea to either an old or a new manufacture. There must be a "physical embodiment of the idea," a showing how the idea can be worked.

It may be news to some of my readers to learn that the granting of a patent is a bargain between the public and the patentee. It amounts to this: "If you [the inventor] will deposit in the Patent Office a statement of your notion, and also a statement showing a method of carrying out that notion, we [the Crown, on behalf of the public] will allow you and no one else the exclusive right to make and sell the produce of the invention for fourteen years. Then, after the fourteen years are up, any of us can use your invention, because the method of doing so has been fully explained by you when you applied for the patent." I may here say that any inventor whose patent is about to expire may petition the Privy Council, six months before the end of the fourteen years, for an extension of his monopoly. He has to prove that his invention is specially advantageous to the public, and that he [the inventor] has not been adequately remunerated for it. There was a case in which an application was made to extend Dr. John Hopkinson's electric-lighting patent. It was proved that the inventor sold his invention and letters patent to a company for £20,000, and that the company had made little, if anything, out of it. The invention was an important one; but the Privy Council refused to renew the patent, because not Professor Hopkinson but the company would obtain the advantage of the renewal. And they held that the Professor, who had made £20,000, had been adequately remunerated for his invention.

The penalties for infringing another's patent are—(1) an injunction, (2) damages, and (3) an account of sales and profits. In other words, the patentee can get the Court to stop you, and he can get damages for your having infringed his rights. But instead of damages he may have an account taken from your books of all the patented articles, or articles made by the patented process, made by you, and can demand the whole of the profits.

Infringement is either (1) by making, or (2) by using, or (3) by selling the patented article or the patented process. The essence of infringement is that the pirate has taken the pith of the invention; and the consequence is that an alleged infringement will be looked at more or less strictly according as the invention is of an entirely new article, or only a new way of making an article already known. Thus, if I invent a new process for making felt hats,

the pith of my invention is in the process—not in the hat. But if I invent a method of making a new article—as, for instance, Mr. Edison did when he invented the phonograph—the pith of the invention is clearly the new article.

**A bit of advice to inventors.**—When you are preparing your “specification”—that is, your description of the invention—for the Patent Office, be sure to make it wide enough; if not, you may have the same misfortune as Mr. Nobel had. That gentleman invented what is called a smokeless powder; that is, an explosive powder for use in firearms, in which powder the parts were so combined that when they were ignited there was a perfect combustion, nothing being left except gas. This was a most valuable invention; and Mr. Nobel in his “specification” described his invention as “a powder made from *soluble* nitro-cellulose and nitro-glycerine.” At the time, Mr. Nobel was not aware that if insoluble nitro-cellulose were used it would produce the same result—or, perhaps, even a better. In fact, none of the chemists of the day were aware of it. But after Nobel’s patent was taken out, someone in the Government employ discovered that insoluble nitro-cellulose would answer the same purpose as soluble. And so the British Government set to work to make a smokeless powder out of insoluble nitro-cellulose and nitro-glycerine—this being the powder called *cordite*. Mr. Nobel was very sore about it. He alleged that his invention was being pirated, and accordingly brought an action against Sir William Anderson, the head of the Ordnance Department, for infringement. But the judge decided against Mr. Nobel, on the ground that anyone reading his specification would at once come to the conclusion that *only* soluble nitro-cellulose was to be used, and that the insoluble article was to be avoided. Now if the word “soluble” had been omitted altogether, how different it would have been; for “a powder made from nitro-cellulose and nitro-glycerine” would have included both the soluble and the insoluble varieties.

The moral of this case is obvious; but, on the other hand, your claim must be somewhat limited. You cannot claim, for instance, “a new method of making wheels for bicycles and other vehicles by means of a judicious combination of hickory-wood and steel,” because that means nothing in particular. You must state your invention in such a way that when your patent expires anyone can put your idea to practical use simply by following the directions in the specification. For that, as I have said, is what the public get in return for giving you a fourteen years’ monopoly.

**A trade mark** is some mark upon goods put there by the manufacturer to distinguish his goods from those of other people. This trade mark may be either a person’s name, *e.g.* “Muggin’s Soothing Syrup”; a device, *e.g.* an eagle perched on a rock; a fancy word, *e.g.* “Ki Ko Ki Tooth Paste”; any special and distinctive combination of letters or figures, or words or figures added to any one of the above marks. For instance, if I wanted to label my new soap distinctly, I should be wise not to call it simply “Binks’s Soap”; for there might be another Binks who, when he knew that my cleanser was making way on the market, would start a soap factory and call his wares “Binks’s Soap.” And so long as he did not imitate my labels, wrappers, or boxes, I could not



touch him. But if I adopt the title "Binks's Q 99 Soap," the other Binks can soon be stopped if he tries to trade on my reputation.

Manufacturers should remember that **a word descriptive of the article cannot be used as a trade mark**, nor a word which is either descriptive or deceptive. For instance, a man once attempted to establish "Anglo-Portuguese Oysters" as a trade mark for a certain brand of the succulent bivalve; but it was held that he could not, because either this must mean that the oysters were Anglo-Portuguese, in which case the name was descriptive of quality, or else people would be deceived into thinking that the oysters were of the Anglo-Portuguese kind. If you want to be sure of having a word that will stand fire as a trade mark, invent the most extravagant combination of letters that you can conceive. A geographical name will not do; although a geographical name which is not an indication of the place of manufacture is protected if it was applied as a trade mark before 1875.

**Old trade marks** are such as were used before the 13th of August, 1875; and in case of such trade marks far greater protection is allowed. A manufacturer can protect any old trade mark consisting of a distinctive device, mark, brand, heading, label, ticket, letter, word, or figure, or combination of letters, words, or figures. This gives a much wider latitude than in the case of new trade marks; because the old word need not be an invented word, and you can register words or figures by themselves.

**How to protect a trade mark.**—As a distinguished politician once said, "Register! Register! Register!" You should make application by letter to the Patent Office, Trades Mark Branch, 25, Southampton Buildings, Chancery Lane, London, W.C., on a form which you may obtain at the post office in any considerable town on payment of 5s. Ask for Form F. You should remember that you must specify with great exactness the kind of goods you propose to mark with your trade mark.

Any applications for the registration of trade marks used on metal goods are to be made to the Cutlers' Company of Sheffield, if the person applying carries on business in Hallamshire, or within six miles thereof. There is also an office open at 48, Royal Exchange, Manchester, where trade marks used in respect of cotton goods are recorded.

The Comptroller of the Trades Marks Register may refuse to register the trade mark if it does not comply with the Act of Parliament, or if he thinks it to be an improper mark; in that case you can appeal to the Board of Trade, and if the Board of Trade back up the Comptroller, you can appeal to the Courts.

The **effect of registration** is not, perhaps, so generally understood as it ought to be. Before there were any Statutes requiring the registration of trade marks, a man made a mark his own by using it publicly. And registration is now equivalent to public use of the mark. That is, before 1875, if I sought to restrain you from using a particular mark upon your goods, I had to show that I had used that mark upon my goods, and that my goods were known on the market by that mark. To-day, all I have to show is that I have registered the mark as a trade mark. But registration is worth something more than

this; for after my mark has been on the register for five years, it is conclusive evidence of my right to its exclusive use. Remember, that although a distinctive mark may be used by you, you cannot bring action on it as a trade mark until you have registered it. And also remember, that if you register an improper mark, such as a descriptive word, you will not acquire any right to it.

The right to a trade-mark is **strictly limited** to the class of goods for which it has been registered, and to the species of that class for which it has actually been used. By "class of goods" I mean this:—For the purpose of registration, goods have been divided into forty-nine classes and one over for "miscellaneous." You can obtain a guide to this classification by writing to or calling at the Patent Office, Southampton Buildings, London, W.C. And in your application you must always state what class you register under. For instance, Class 5 includes "Unwrought and partly wrought metals used in manufacture," such as iron sheets, wire, copper, cast steel, and so on. Now, a man named Edwards was the registered owner of a trade mark in Class 5, which he had registered for the entire class. The mark consisted of the god *Neptune* sitting on a trident. Mr. Edwards was an iron sheet manufacturer, and stamped his Neptune and trident on his sheets. Some years afterwards, a French firm of Felten & Guillaume registered a similar Neptune and trident as their trade mark for wire, which is also one of the articles in Class 5. Edwards tried to stop them from using it, but failed; because he had never applied the mark to wire, but only to sheets of iron. And an order was made to alter his trade mark on the register, cutting it down to iron sheets only.

The **remedy for infringement** of a trade mark is to bring an action for an injunction to stop further injury, for damages for past injury, and for the delivery up of the falsely-marked goods to the real owner of the trade mark. And the Merchandise Marks Act, 1887, makes every article to which a trade mark is falsely affixed forfeitable, and empowers the Court to order the forfeited goods to be destroyed. There is a similar provision in the Artistic Copyrights Act, and I remember a very effective use being made of it in the Court of Appeal. Many of my readers will remember, I daresay, the craze in the London music-halls for "living pictures." The notion was to take the design of some well-known picture, say "The Huguenots," and make up a tableau with men and women dressed and posed as in the picture. The women were generally of the most charming. The proprietors of one of the halls soon came to blows with the owner of the copyright in one of these pictures. Said the latter, "You are copying, or reproducing my picture without my leave; and I am entitled to an injunction to stop you." The purveyors of amusement refused to stop; and when the picture-owner brought his action, the counsel for the music-hall argued thus: "My Lord, if this 'living picture' is an infringement of the plaintiff's work of art, the plaintiff is entitled to have the copy delivered to him to be destroyed. The copy is in Court." And here he pointed to three charming young ladies in the back row. The picture man lost; for their lordships had not the heart to surrender the "living picture" to the flames.

**Criminal liability** is fastened on persons who are guilty of offences against



the Merchandise Marks Act. The offences are, forging a trade mark ; falsely applying to goods any trade mark ; applying a false trade description to goods ; selling or exposing for sale or having in possession for trade purposes any goods bearing a forged trade mark or false trade description. The offender is brought before the magistrate (or sheriff), who can deal with the case himself and inflict a fine not exceeding £20, or imprisonment with or without hard labour not exceeding four months. For a second or subsequent offence, the fine may be £50 and the imprisonment six months. In a bad case the offender may be committed for trial ; and if he is convicted by the jury, the judge may fine him up to any amount and sentence him to imprisonment not exceeding two years. The goods are to be forfeited in any case. It should be noted that one of the false trade descriptions prohibited by the Act is a false statement or indication as to the place or country in which any goods are made or produced. Hence arose the familiar "**Made in Germany.**" It sometimes happens that goods are made partly in Britain and partly abroad. For instance, a cutlery manufacturer makes knife handles and sends them to Germany to be fitted with blades. It would be incorrect to say that the knives were made in Germany, and equally incorrect to say that they were made in England. Therefore, if the English manufacturer puts his name or any English address or words on the knives, he must stamp them, "Blades made in Germany."

There is, as far as I know, no law compelling any one to indicate upon his goods the place of origin. What he must do is this : he must take care not to mark his goods in such a way that people would think that they were manufactured or produced in one country, when in fact they came from another. Thus, if one sells lithographs printed in Germany bearing no name or words which would cause purchasers to believe that they were printed elsewhere, there is no necessity to mark them "Printed in Germany." But if you import such lithographs bearing (say) your name, "Green & Son, Glasgow," or even "Green & Son," you must stamp them all, "Printed in Germany." The reason is that anyone seeing a British name or address on the goods would naturally suppose those goods to have been produced in the United Kingdom ; which would be a wrong impression in the instance quoted.

I should say, that it is just as much an offence for a British manufacturer to mark his goods (say) "Sheffield steel" when really made in Birmingham, as it is for him to call them of British make when they were made in Germany.

By Section 16 of the Merchandise Marks Act, 1887, goods liable to forfeiture for infringement of the Act **are prohibited from importation**, which means, in practice, that the Customs officials may seize them at the port. If you ever have any goods seized in this way, your best plan is to approach the Customs Office and ask them to allow you to mark the goods. If it is your first offence they will probably not object.

Quite apart from any Act of Parliament, it is obtaining money by false pretences, and therefore a criminal offence, to sell goods under a spurious mark which is known to be spurious. For instance, if a publican sells beer which he knows not to be brewed by Bass & Co., in a bottle bearing Bass &

Co.'s label, he has obtained his customer's money by false pretences and may be sent to gaol for it.

**Trade name—unscrupulous rivals—"passing off" their goods as yours.**—As I have already shown (p. 666-8), there is a common-law right, quite apart from the Trade Marks Acts, in any manufacturer to prevent people from passing off on the public goods alleged to be his which are not his. This kind of thing most commonly occurs when a manufacturer has obtained a good name on the market, and calls his goods by a particular name and gets them up in a particular manner. Then some unscrupulous rival comes in with an article bearing a similar name, with similar wrappings, labels, and so on, calculated to deceive unwary purchasers and to take away the successful man's trade. Most manufacturers of well-known and much-advertised articles have had to meet this kind of unscrupulous rivalry. But there is a remedy for it by injunction. Thus, Lever & Co. sold soap in packets wrapped up in a peculiar parchment-like paper, with "Sunlight Self-washer" printed in a peculiar style thereon. Goodwin & Co. began to sell soap wrapped in the same kind of paper, with "Goodwin's Self-washer" printed thereon in exactly the same style as Lever's.

Lord Justice Cotton put the law on the subject in a nutshell. "Looking at the two tablets, one cannot but see that there is a strong general resemblance between them, and especially in the eyes of people who cannot read. But defendants' contention was this: there is no trade mark in 'Self-washing' or 'Self-washer'; there is no monopoly in this parchment paper; there is no monopoly in the spaced printing—then why should we be restrained, in carrying on business, from using those things as to which the plaintiffs cannot claim any monopoly?" And he went on to say that if the defendants combined the things so as to pass off their goods as the plaintiffs', then it was a fraud, and they would be restrained from continuing it.

But in dealing with rivals you must be careful not to go too far in the way of advertising, **warning the public not to purchase their goods.** One knows the common form of these advertisements: "The public are respectfully warned against persons who foist upon them an article which they pretend to be the same as that manufactured by Sarah Greenbank." Such a warning may be good enough; but if it is false, and not made in good faith, it will involve the advertiser in an action for trade libel. Thus, such an advertisement was put forward by Thorley's Cattle Food Company; but it turned out to be untrue, because another Thorley, who had become possessed of the original cattle food recipe, was manufacturing the identical article. And this gentleman compelled Thorley's Cattle Food Company to withdraw their advertisement. In other words, you must not advertise that your rival's goods are spurious unless they really are. And they are not spurious if they are exactly like yours in composition and manufacture, though they are not made by you.

You can always obtain an injunction to prohibit anyone from making use of information that he has acquired by a breach of confidence. Thus, if you make an article according to a **secret recipe** you can stop a discharged servant or clerk from using that secret. The principle is the same in such cases as



that of the late Prince Consort against one Strange. The Queen and Prince Albert had made a number of etchings for their own private amusement ; and sent them to a printer to be printed. Strange somehow got hold of copies from one of the printer's men, and promptly started an exhibition, and printed a catalogue. But Prince Albert took action in the Court of Chancery and obtained an injunction to stop Mr. Strange.

**Manufacturers' fixtures.**—It is a legal principle, as I have said in the chapter on the Householder and his Landlord, that as a rule, when movable things are fixed to a building, they become part of that building, and cannot be removed. But in favour of trade, large exceptions have been made to this rule ; and the rule is now firmly established that trade fixtures can always be removed, unless to remove them would practically demolish the building in which they are. So that a manufacturer can practically always remove his machinery, however firmly riveted to the walls or floors ; provided, of course, that he pays for the damage he causes to the building.

## CHAPTER VIII.

### THE LAW OF THE MERCHANT.

When goods sold become the buyer's property—Importance of the topic—Risk—Bankruptcy of buyer—Of seller—Quality of goods sold—In sale by description—In sale by sample—Goods must correspond with sample—And be merchantable—Flaws not apparent in the sample—Complaint of inferior quality should be made at once—Sending goods by land or sea carrier—Seller's duty to make a proper contract for carriage—MARINE INSURANCE—Must be an insurable interest—What may be insured—Loss is total, constructive total, or partial—What is constructive total loss—How loss is adjusted or assessed—Marine insurance is a contract of utmost good faith—Insured must not conceal material facts—Misrepresentation—Difference between a statement of fact in the policy and not in the policy—The risks and losses insured against—What is barratry—The losses not insured against—Ordinary wear and tear of ship—Inherent vice or defect in the goods—Where the loss is only remotely caused by peril insured against—Loss caused by own negligence—Unseaworthy ship—What is seaworthiness—Only applicable to commencement of voyage—Insurance “at or from” the port—Bills of lading—Form of—How the seller of goods may insure payment of the price—Rights of buyer and seller when goods are shipped—Stoppage in transit when buyer becomes insolvent—Consequence of stoppage—Negotiating the bill of lading—When transit is at an end—A doubtful case—How the seller's right of stoppage may be defeated—The seller's lien or right of retention for the price.

**When do goods become the property of the buyer?** The answer depends on the answers to two other questions; namely, what kind of goods are you speaking of? and are the goods, when sold, ready for delivery? The rule is that when you have a contract to sell goods, the moment that contract becomes absolute and unconditional the goods belong to the buyer. And in this connection you must always ask the two questions above mentioned. First you ask, “What are the goods in question?” And if the answer is, “This piano,” “That horse,” “My two rare copies of Homer's ‘Iliad’ bound in calf,” or any other **specific definite articles**, then you will know that the goods became the property of the buyer immediately he agreed to buy and the seller agreed to sell. Thus—

“Will you [Smith] buy this piano?”

*Answer:* “Yes.”

The piano is Smith's.

Now comes the question, “Was the contract unconditional?” For instance:

“Will you [Smith] buy this black marble clock for £8?”

*Answer:* “I will, if you will first have it cleaned and regulated.”

“Good! That shall be done.”

Here you have a sale of the clock conditional on its being cleaned and



regulated. The clock does not become Smith's until I have had it cleaned and regulated. But when this work has been done the condition is fulfilled, and therefore the contract is now absolute and unconditional, and the clock is the property of Smith.

Now take the case of goods or merchandise not consisting of one or more specific articles—for instance: You are a tea merchant, and to your warehouse I come one day, and, seeing some tea that I like the look of, I say, "Send me a hundredweight of that Ceylon tea." This is an order that does not relate to any particular parcel of one hundredweight, and the contract is to some extent undefined until you weigh out 112 pounds and put it in a case to be delivered to me. The same holds good if the thing agreed to be sold has to be measured or counted: it does not become the buyer's property until such measuring or counting has been done.

This law about the precise time when the goods become the buyer's property—or, as lawyers put it, the ownership passes from the seller to the buyer—is very important. I will tell you why

First, **the buyer does not take the risk** of the thing sold until it becomes his. I daresay some of you know what I mean by "take the risk." It very often happens that between the agreement and the time when the goods are delivered to the buyer, something goes wrong, and the goods are destroyed or damaged. Now, if those goods were at "seller's risk," the seller bears the loss. If at "buyer's risk," the buyer suffers (*see* p. 328). Consequently, if the thing sold is destroyed before it becomes the buyer's property, the seller must bear the loss. Take the case of Logan & Co., timber merchants, who bought from a Canadian named Le Mesurier a quantity of red-pine timber then lying above the rapids on the Ottawa River. The contract said that there were 1,391 pieces, measuring 50,000 cubic feet, *more or less*; and the seller undertook to deliver the whole amount at a certain boom at Quebec. Logan & Co. were to pay 9½d. per cubic foot, *measured off*; and they paid down, before delivery, for 50,000 feet (£1,979 3s. 4d.). If the quantity, when measured, turned out to be more than 50,000 feet, Logan & Co. were to pay 9½d. per cubic foot for the balance. If it turned out to be less, Le Mesurier was to refund what had been overpaid. I wish you to observe that the contract was not absolutely determined until the timber had been measured; and it was not to be measured until it was delivered at Quebec. As the custom is, the timber was floated down the river lashed together as a raft. A storm arose, and the raft was broken up; so that only a small number of logs arrived at Quebec. Logan & Co. took what there was, and demanded back the difference between the price of what they had paid for and what they had received. But Le Mesurier declined to refund. He said, "You had bought the timber, and the risk of carriage was yours." The Court, however, held otherwise. Their lordships said, "The timber did not become the property of Logan & Co. until it had been measured; and those gentlemen did not take any risk until the goods became theirs." Wherefore Le Mesurier had to refund the greater part of the £1,979 3s. 4d. that he had received.

Let me show you the difference it would have made had the timber been

the property of the buyers at the time the raft was broken up. Supple sold to Allan Gilmour & Co. "a raft of timber, now at Carouge, containing red and white pine, about 71,000 feet, to be delivered at Indian Cove booms. Price for the whole, 7½d. per foot." The raft *had been measured* this time, and was found to contain 71,000 feet; and Mr. Supple's men safely piloted it to Indian Cove. But that very night the usual storm arose and sent the huge logs flying down the river. Gilmour & Co. claimed that Supple must bear the loss; because, they said, they (Gilmour & Co.) had not measured the timber after it had been delivered. This defence did not succeed. "You were quite entitled," remarked their lordships, "to measure the timber for your own satisfaction, but as far as ascertaining the quantity sold was concerned, that had already been done by the measurement before delivery. The goods became absolutely yours when they were brought to the Indian Cove booms, and you must pay for them in full."

The question "Had the ownership of the goods changed?" also arises in an acute form **when the buyer or seller goes bankrupt before delivery.** Take this case:—Meyer had a lot of starch in a warehouse. He sold the whole to Jones at £6 per cwt., and ordered the warehouseman to weigh and deliver it. Part was weighed and delivered, when the buyer went bankrupt. Meyer ordered the warehouseman not to weigh or deliver any more, but the trustee in bankruptcy claimed that the starch was the property of Jones, and therefore it had passed to him (the trustee). If this argument had been correct, Meyer would have been bound to deliver the rest of the starch and accept a composition for the price. But the Court decided that as the price depended on the weight, the starch did not become Jones's until it had been weighed; so that Meyer was not liable.

Now for a case where the seller became bankrupt. Swift agreed to sell to Morrice the trunks of certain trees. Swift had to cut down the trees, after which they were to be measured by Morrice, who marked off the portions that he required. Then Swift had to cut off the parts not wanted, and at his own expense convey the timber from his place at Monmouth to Morrice's place at Chepstow. The trees in question were felled, measured, marked, and paid for. But the waste parts had not been cut off, and the trees were still lying on Swift's land at Monmouth. At this point Swift went bankrupt, and all the goods owned by him became the property of his trustee in bankruptcy. Morrice put in a claim for the trees, saying that they were his—bought and paid for. But the Court decided against him. The ownership of the trees, they said, did not pass from Swift to Morrice until all the conditions of the contract had been fulfilled. Now here all conditions had not been fulfilled, because Swift had still to cut off the waste parts and carry the good timber to Chepstow. Until this was done, the trees were Swift's property. Being Swift's property, they became the property of the trustee in bankruptcy. And the result was that the trustee kept the trees and sold them for the benefit of all Swift's creditors, while Morrice could only claim the return of the money he had paid—that is to say, he got a composition of so much in the £.

So, you see, the question "When do the goods become the property of the



buyer?" is not so academic as it looks. It is of very great practical importance, and the above instances show how salutary is the principle generally expressed by the words "Cash on delivery." For if the seller has done all that is necessary under the contract to put the goods in a deliverable state (as weighing, measuring, etc.), and has not stipulated for cash on delivery, the goods become the property of the buyer, and his trustee in bankruptcy can, of course, claim them; while the unfortunate seller can only get a composition on the price. On the other hand, if the seller goes bankrupt before goods are in a deliverable state, a buyer who has paid his money in advance will not get his goods, and will have to take his chance of composition on the money he has parted with.

**Sale of goods—Quality.**—I have already shown (pp. 671 and 708) that when goods are ordered for a particular purpose, and the buyer tells the seller the purpose for which he requires them in such a way as to show that he relies on the seller to sell him goods fit for that purpose, the seller guarantees the goods to be fit. This doctrine most usually comes into play when the seller is a manufacturer, but it applies none the less when he is a merchant.

But the usual case in which a merchant is attacked on account of the quality of goods sold by him is in the case of sale by description. **Sale by description**, as distinguished from sale by sample, is this: in sale by description I say to you, "Send me per rail twelve bags of waste silk."—Sale by sample is where you show me a small piece of waste silk, and I say, "I will take twelve bags like that." There is yet another kind of sale: I come into your warehouse and see twelve bags of waste silk, examine them, offer you a price for them, which is accepted, and the goods are mine.

Now, if I order from you, by description, any goods *of the kind that you profess to deal in*, I have a right to expect those goods to be of a saleable quality—goods, that is, such as I should be able to sell again. Please note the words in italics: they are italicised because I want to draw your attention to the fact that if I order bacon from a coal merchant, or calico from a tea merchant, I have no right to expect any particular quality to be supplied.

Now, let me give you an instance or two of the application of the doctrine that "in a sale by description there is an implied condition that the goods shall be of a merchantable quality." Mr. Gardiner ordered from Mr. Gray "twelve bags of waste silk." Gray sent twelve bags of silk that certainly was waste—so much so that Gardiner could not possibly use it or sell it again. Whereupon he brought an action for his money, and he got it back. Lord Ellenborough put the law thus: "He [Gardiner] cannot, without a warranty, insist that it shall be of a particular quality or fineness. But the intention of the parties must be taken to be that it shall be *saleable in the market* under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on a dunghill."

There was another case, known to lawyers as "the Manila hemp case," in which Jones & Co., a Liverpool firm of merchants, agreed to buy from one Just, a London merchant, a large number of bales of Manila hemp. The hemp came by ship from Singapore, and on the way the carrying vessel met with such foul weather that the salt water got in amongst the cargo. The

consequence was that when the hemp arrived, though it was still recognisable as Manila hemp, it was quite useless to Jones & Co., for they could not dispose of it. It was, in fact, to use Lord Ellenborough's language, "only fit to be laid on a dunghill." Unfortunately for themselves, Jones & Co. had paid for the hemp in advance, before the ship arrived. Had this not been so, doubtless they would have refused to touch the precious cargo and would have brought an action for damages against Just for refusing to deliver according to contract. But in the circumstances they did the best thing they could do; namely, unloaded the hemp and sold it for what it would fetch. It fetched 75 per cent. less than Jones & Co. had paid for it; and for this 75 per cent. they sued Mr. Just—as well as for the loss of the profit they would have made had Manila hemp of proper quality been supplied.

Just fought the case. Said he, "I did not guarantee the hemp to be of any particular quality. I only contracted to deliver to Jones & Co. so many bales of Manila hemp. They admit that they have received the right number of bales, and that the stuff is Manila hemp. What more do they want?" But it would not do. The Court held that "Manila hemp" meant Manila hemp of a saleable quality—not the kind of stuff that has to be sold for a quarter of the price it was bought at. So Just lost his case and had the satisfaction of knowing that his name will be long remembered by the brethren of the long robe in connection with a "leading" case. A "leading" case is one in which some principle previously regarded as doubtful or uncertain is authoritatively decided. But I imagine that Mr. Just would have preferred a different kind of immortality.

In **sale by sample** it is an implied condition of the contract that the bulk shall correspond with the sample in quality, and the buyer has always the right, on a sale by sample, to have a reasonable opportunity of inspecting the bulk before he can be called upon to take delivery. If on inspection the goods turn out to be inferior to sample, the buyer has the right to reject them altogether; or he can take what is offered and claim compensation for the inferiority in quality. Suppose he has not paid, he can deduct from the price an amount that is reasonable. Thus, if you sell me 100 cases of tea as per sample, at 8d. the pound, and I find on examination that the tea is of an inferior quality, such as is generally sold for 7d., I need only pay you the 7d. If I have paid you the price calculated at 8d. a pound, I can sue you for the return of a penny per pound.

There is a further condition in every sale by sample that the goods shall not contain any flaw or defect rendering them unsaleable, which would not be apparent on a reasonable examination of the sample. This is, perhaps, only another way of saying that the alleged sample must really be a fair representation of the bulk. One very often meets with this kind of thing in practice: Slome, a woollen-cloth merchant, sells to Sizzers, a tailor, so much cloth, of which a sample has been shown. When Sizzers receives his goods he finds a flaw running right through the greater part of the bale, and when he complains, he is met by the answer, "Oh! but I cut the sample right off that bale." This in itself is no defence to Sizzers's claim for compensation or reduction in price;



for it may very well happen that the flaw was not visible on an examination of the sample, though it was at once apparent when the large piece of cloth was looked at. The only defence that Slome can have is that Sizzers ought to have seen the flaw in the sample and would have seen it had he been reasonably careful. But here again you must remember that a buyer is not supposed to put samples under a microscope, or have them chemically analysed or anything of that kind.

I should also say that Slome has a good defence if he can show that the defect does not render the cloth unmerchable—that is, unsaleable. And by “unsaleable” you are not to understand me to mean that the goods cannot be sold; for if that were the meaning of the term nothing is unsaleable. But by “unsaleable” or “unmerchable” is meant that the goods could not be sold to anyone under the description by which they were sold to Sizzers. Thus: “West of England Vicuña cloth” means cloth of that description and also cloth which will fetch in the market the average price of cloth of that name and of good quality. So that if Slome sends cloth so bad that Sizzers, if he sold it to a man who knew what he was buying, would have to sell it at considerably less than Vicuña cloth generally realises, that cloth is unmerchable.

In this kind of case, also, the buyer has the option either of returning the goods or of claiming compensation for their defective condition. And in connection with this subject let me give my readers this piece of advice:—

**A friendly warning.**—When goods are sent to you, whether bought by sample or by description, take an early opportunity to unpack and examine them, and should you find anything wrong, take pen and ink and write to the seller at once, telling him what is the matter. It does not pay to wait until settling day comes round and then to write and complain; for you at once lay yourself open to the charge of manufacturing a claim in order to obtain a reduction of your account. If possible, you should, when you write your letter of complaint, set out the faults complained of fully, and at the same time add that the goods are still lying in your warehouse (or wherever else they may be) and that you will be glad to receive your correspondent or his representative and to point out the defects specified. This course is not only the fairest and most businesslike, but it will stand you in good stead should the seller scout your complaint and try to make you pay the full agreed price by legal process. I have heard it said scores of times when a defendant [defender] has set up the defence of bad quality, “Why did you not complain at the time?” Which is followed by the second question, “Then you never complained of the quality of these goods until the seller pressed you for payment?” It requires no very trained mind to see that if you are able to answer, “I did complain at the time and offered to point out the defects,” you score a point.

**Sending goods by land or sea carrier.**—As a rule, delivery of the goods to a carrier is delivery to the buyer; because when the seller has to send the goods (*i.e.* the buyer is not obliged by the contract to come and take them) the seller is the buyer's agent to deliver the goods to the carrier. And it is the seller's duty to make a proper and reasonable contract with the carrier

for the safe transmission of the goods. When this is done, the buyer takes all the risk of accidents in the course of carriage; but when the seller does not make such a proper contract and the goods are damaged in the course of transit, the seller must stand the loss.

When the goods are sent to the buyer by a route involving sea transit (*e.g.* London to Hamburg) in circumstances in which it is usual to insure, the seller must give such notice to the buyer as will enable the latter to effect a **marine insurance policy**. Should the seller fail to give the proper notice, the goods are at his risk during the sea transit. If he has given proper notice, the goods are at the buyer's risk. It frequently happens that the buyer in such circumstances agrees with the seller that the latter shall insure for him, and this is a very good course to adopt. When such an agreement is made the seller must take care that he insures in the buyer's name. He cannot have the policy in his own name, because he has no interest in the goods. The goods become the buyer's property as soon as they are shipped, and he therefore takes all risks from that time. But suppose the goods are sent by express contract at seller's risk, then the seller insures in his own name; because should the goods be lost at sea it is he who would suffer the loss of them. This leads me to consider the question of

#### MARINE INSURANCE,

which is a contract by which one party, for a fixed sum called a premium, undertakes to save the other party harmless (up to a certain figure) against loss of goods or ship, or both, by perils of the sea. You will notice that the person who receives the premium and takes the risk—called an “underwriter”—only undertakes to pay the other party what he actually loses by perils of the sea. In other words, marine insurance is a contract of indemnity, as fire insurance and burglary insurance are. And it consequently follows that you cannot insure a ship or goods unless you have some **insurable interest** in them—that is, unless you would be out of pocket if the ship or goods sustained injury by the perils of the sea. You need not be the owner of the goods or the ship, so long as you have some interest in them; and you can of course, insure against loss other than that of ship or goods. For instance, if I book by the Cunard Line to New York from Liverpool, and the ship is cast away just off Ireland, and I am landed in Ireland, there is an obligation on the Cunard Line to forward me by another ship or to return the passage money. The Cunard Line can then, if they please, insure against loss of my passage money. The captain can also insure his wages. If you advance money on the security of a bill of lading (p. 731) you may insure the cargo included in that document; and, in fact, there is no conceivable kind of maritime risk which is not insurable. But it must be a real risk. You must not bet on the chances of other people's property coming safe to land.

And in one respect marine insurance is more strict than life insurance. I cannot insure your life unless I have a pecuniary interest in your continued existence—for instance, you owe me money. But having insured when I had a pecuniary interest in you, suppose you repay the money you owe me, I can still keep up the premiums, and when you die I can claim the money from the insurance company. Marine insurance is different. If I have an interest in a



cargo or a ship, and insure that cargo or ship against maritime risk, paying the premium to the underwriter, yet if I part with my interest and the ship or cargo is lost, I cannot recover any part of the money insured. In other words, I must have an insurable interest not only at the date of the insurance but also at the date of the loss.

There are **three kinds of loss** included in a marine insurance policy, namely, total loss, constructive total loss, and partial or average loss. Total loss is where the thing insured absolutely perishes, or its recovery is quite hopeless. Constructive total loss is where the thing insured is neither lost beyond all hope of recovery, nor absolutely destroyed, but it is either so lost that its recovery is very, very doubtful, or else its recovery or repair would in all probability cost more than the thing would be worth when mended. For example:—The ship *Terrible* is insured against loss at sea for the sum of £8,000. She is now worth (say) £9,000. She strikes on a rock off Cape Ushant, her sides are smashed, her engines are damaged, her masts are broken, and her steering-gear is totally broken up. Ultimately she fills and settles down. Now, it might be possible to raise the ship, to repair her sides and her engines, and to fit her up with new masts and steering-gear; but the cost of these repairs and amendments, and the expense incurred in raising the ship and towing her into port for repair, would amount, perhaps, to £8,000; and when so recovered and repaired she would not be worth more than £6,500. This is a constructive total loss. If she were not so severely damaged, but could be raised, towed into port, repaired, and refitted for (say) £2,500, it would be a partial or “average” loss. On the other hand, were she sunk in mid-Pacific, so that by no means known to science could she be raised at all, it would be a total loss. It is also a constructive total loss if the ship is captured by a hostile power or pirates, or if the crew turn pirates and run away with her.

The *adjustment or assessment of loss* between the insured (the merchant, that is) and the underwriter is not by any means an easy matter. There are men who practise what is called “average adjustment” in every part; and it is generally a wise thing to put the matter in the hands of one of these gentlemen if you have sustained a heavy loss on goods that are insured.

Let me say that whenever the merchant or shipowner claims as for a constructive total loss of the goods or ship, he must abandon to the underwriter the subject of the insurance. And he must do this within a reasonable time. For example, I have goods on board a ship which is detained in the port of Smyrna—which port is so blockaded by a hostile fleet that the ship and consequently my goods also are indefinitely detained there. This is a constructive total loss, and I can claim my full insurance, provided that I give notice to the underwriter of the blockade, of my claim, and of the fact that I abandon the goods to him. He pays me, and should the ship escape by running the blockade, or should the war be terminated before the goods are destroyed, the underwriter is at liberty to sell them for what they will fetch, and keep the proceeds. This notice of abandonment need not be in any formal or lawyery style. Generally the insurance policy requires it to be in writing; if not, a mere verbal notice is sufficient. From the time of the notice being given all the

benefit and burden of the thing abandoned passes to the underwriter. He pays freight and other charges—duty, dock dues, etc., and the merchant is relieved of responsibility.

In estimating a **partial loss** there are a few rules to be observed. **As to goods**, the rule is a little peculiar, and is quite different from a claim for damage under a fire or burglary policy. If I insure my furniture against loss or damage by fire up to £500, and my writing-table is set alight and one of the legs is burnt off, we merely estimate the values of the table before and after the fire. The difference is my loss, and that amount I can claim from the insurance office. Now, take the case of Jones who ships from Liverpool to New York a parcel of woollen stuffs. The total value of the parcel in Liverpool is £400, but in New York it would sell for £800. Jones insured it for £500—the extra £100 being added for cost of insurance, commissions, and so on. The cloth is damaged by salt water, so that when it reaches New York it is only worth £600; that is, £200 of its selling value has gone. Can Jones claim £200 from the underwriter? Certainly not. You calculate it thus: One-fourth of the total selling value is the proportion which the seller loses. But he has not insured for the total selling value. The value as agreed between him and the underwriter was five-eighths of the ultimate selling value—that is, £500, the amount of the policy. Hence Jones is only entitled to one-fourth of the insurance money=£125; which is in the same proportion to £500 (amount of policy) as £200 is to £800 (total selling value of sound goods).

After a loss, either total or partial, has occurred, it is usual for the merchant or shipowner to employ a broker or average-adjuster, who, in conjunction with the underwriter or his broker, adjusts the loss and indorses the adjustment on the back of the policy. For instance, in the case given in the last paragraph he would indorse, "Adjusted the loss on this policy at £25 per cent." This indorsement is initialled by the underwriter or underwriters. It should be particularly observed, however, that this assent by the underwriter to the adjustment does not bind him to pay. It is merely a mode of saying, "If I am liable at all I am liable for this amount." So that the claim may still be contested—on the ground, for instance, that the merchant had no insurable interest in the goods.

**Good faith and misrepresentation.**—A contract of Marine Insurance is one of the utmost good faith. In the case of most contracts an actual misstatement of fact by one party is sufficient to give the other a right to cancel the agreement. But insurance against perils of the sea and navigation stands on a higher platform. It is the duty of each party to communicate to the other every fact which he knows to be material to the risk. This, of course, does not apply to such things as are equally within the means of knowledge of both parties. Thus, if a merchant insures £1,000 worth of goods from Glasgow to New York and he knows that the ship is carrying dynamite or gunpowder, he ought to tell that to the underwriter. If he conceals the fact, the underwriter has the option of cancelling the contract, even though the goods are lost or damaged in a storm and not by any explosion of the dynamite or powder. On the other hand, if a merchant insures goods on a voyage from Southampton



to some place far up the river Zambesi, he need not tell the underwriters that this is a dangerous voyage because of the ferocious character of the natives and the number of shoals on the river. For these facts are just as much within the means of knowledge of one man as of the other.

When there is a **representation in the policy**, it is called a warranty; and the merchant guarantees that it is absolutely correct. Thus, if the policy states that "The ship sailed on the 1st of June," or "The ship will sail on the 1st of June," and the ship does not sail on that date exactly, the underwriter may cancel the policy. It matters not whether the date is material to the risk or not. Thus, if the ship sails on the 31st of May or the 2nd of June, though it would have been just as safe to insure her sailing on either of those dates as on the 1st of June, the underwriter escapes liability on the policy. I need hardly point out that the proper thing to do is to express the policy thus: "The ship will sail on *or about* the 1st of June." This strictness does not apply when the representation is not actually in the policy.

If the merchant makes a statement in relation to the goods or ship, but that **representation is not put into the policy** itself, the merchant will only be held liable to make it good provided it is material to the risk. Thus, if the goods insured are carried by the ship *Hector* and the merchant verbally states that the *Hector* is a Greek ship whereas she really flies the Italian flag, this representation may or may not be material. It would be very material if at the time the kingdom of Italy was at war with (say) France; for there would be the risk of capture. On the other hand, if neither Greece nor Italy were at war the statement would, in all probability, be quite immaterial; because it would make no difference to the risk whether the goods were carried under the Italian flag or the Greek.

**The risks and losses insured against.**—The ordinary form of policy used in Great Britain is what is called a "Lloyd's policy." Lloyd was a man who flourished towards the end of the 17th century and kept a coffee-house in Tower Street, London, afterwards removing to the corner of Abchurch Lane and Lombard Street. This coffee-house was the great resort of merchants and others who had business in the shipping trade, and the proprietor encouraged this class of custom by every means in his power. Amongst other things he started a shipping and commercial journal called "Lloyd's News," which afterwards became and still is "Lloyd's List." In 1769 or thereabouts the merchants frequenting Lloyd's formed themselves into an association and were afterwards incorporated by Act of Parliament. So that "Lloyd's" is the recognised centre of the shipping world, and the usage of Lloyd's is now accepted in the Courts as being practically the custom of the shipping trade. In about 1779 Lloyd's Association drew up a form of marine insurance policy and agreed amongst themselves not to use any other, and this policy has continued in force down to the present time. The only alteration made has been at the beginning of the policy. It used to begin, "In the name of God, Amen." It now commences, "Be it known that."

The risks undertaken by the underwriters on a Lloyd's policy may be gathered from the following clause:—"Touching the adventures and perils

which we, the assurers, are contented to bear and do take on us in this voyage, they are of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter-mart, surprisals, taking at sea, arrest, restraints and detainments of all kings, princes and people of what nation, condition or quality soever, barratry of the masters and mariners, and of all other perils, losses and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandise and ship [*or whatever the thing insured may be*] or any part thereof." A pretty inclusive list of the dangers and perils of the sea.

Most of the above terms explain themselves, except perhaps the term "**barratry.**" Barratry is some wilful act on the part of the master or mariners, committed with criminal intent and in violation of their duty to the ship-owner and without his connivance. But a mere act of negligence or an error of judgment, however bad, is not barratry. A master or crew scuttling the ship, burning her, or running her ashore, would be guilty of barratry. And so they would if they took the ship into a hostile port and delivered her over to the enemy. And, again, if they go in for a bit of private smuggling by virtue of which the ship or goods are forfeited; or attempt to run a blockade; or try to run away from a port without paying port dues. But I imagine it would not be barratry to try to break through a "pacific blockade," for a pacific blockade is not recognised by law. And, moreover, I think that a British admiral of captain who detained or interfered with a British ship in order to enforce a pacific blockade would be liable to pay damages. This none the less because he happened to be acting under orders from the British Government; for it is a fixed principle of British law that a man who commits an illegal act against a subject of the Queen is answerable for it in a Court of law; and it is no defence for him to prove that he did the act in furtherance of an order from his civil or military superior.

**Losses not insured against.**—An ordinary Lloyd's policy does not cover every kind of loss of or damage to the ship or goods insured. The following are the principal kinds of loss not covered:—(a) Deterioration incidental to and ordinary delay in navigation; such as the breaking of a steamer's shaft where the breakage was not caused by heavy weather; the ordinary wear and tear of the hull or machinery of the ship; or the necessary deterioration in goods caused by ordinarily careful loading, packing, unpacking and unloading. Such loss must be borne by the merchant.

Then there is (b) Deterioration or destruction of goods owing to some cause of defect in the goods themselves. For instance, if you insure a cargo of cattle, and some of them die on the voyage through disease; or if you insure a cargo of flour and it becomes heated and finally smoulders by internal combustion. These losses you must bear yourself. But the insurer must pay if the cattle are so injured by being thrown about in extraordinary heavy seas that they have to be killed; or if the flour is damaged by a storm breaking open the hatches and the salt water getting in.

Another kind of loss not insured against is (c) Loss caused by the perils insured against, but only remotely. Thus, if you send a cargo of meat by



ship from Plymouth to Hamburg, to be sent thence to Leipsic by rail in time to arrive for the Leipsic Great Fair; and by bad weather the boat is compelled to run for the Downs and remain there for several days, so that your cargo is many days too late for the fair and you lose your market: you cannot claim this loss from the underwriter.

Neither can you claim (*d*) Loss directly due to your own or your agents' carelessness. And for this purpose you are responsible for the carelessness of the master and crew and of the shipowner. So that if your cargo is eaten up by rats, or destroyed by bugs, or damaged through careless packing or stowage, you have no claim on the underwriter. Nor have you if the goods are stolen, owing to the captain of the ship not placing a sufficient watch.

Lastly, you have no claim for loss or damage (*e*) if the goods are carried on deck, unless the policy expressly allows them to be so carried. So that if your contract with the shipowner is to load your goods on deck, take care to mention this fact to the underwriter, and have a clause inserted in the policy.

The **seaworthiness of the ship** by which insured goods are sent is a matter for grave consideration in effecting an insurance. For whenever you insure either the ship or its cargo against marine perils you guarantee the ship to be seaworthy. This may appear surprising when you consider that "a merchant," not the owner of a ship, but merely a hirer of so much space for the carriage of a parcel of goods therein, is not really likely to know anything about the seaworthiness of the vessel. Nevertheless, if you insure a parcel of goods "*ex Framjam*, Bombay to Liverpool," your insurance is based on the fact that the *Framjam* shall leave the port of Bombay in a seaworthy condition.

"What is seaworthiness?" some of my readers inquire. Well, it is having the ship in such a condition as to be reasonably fit for her contemplated voyage. This means, not only that the mere ship as a built ship is fit, but that her machinery is in fair order and condition, and her master and crew are competent and sufficient in number. Even more than this, the ship is not seaworthy if she is sent to sea with her cargo so stowed that she can hardly carry it without danger. There was a case not many years ago in which one Harris insured a cargo of wine valued at £7,000 from San Lucar to England. This wine was to be carried on or under deck. In fact, it was carried on deck, and the barrels were so packed as to be dangerous to the ship in rough weather. And rough weather the vessel was almost sure to encounter, seeing that she had to cross the Bay of Biscay in the autumn. Such rough weather she did experience. The vessel was saved, but the casks of wine were jolted together and many of them stove in. Mr. Harris claimed against the underwriter for their value; but it was held that the way the wine-barrels were packed made the ship unseaworthy, and Harris could get nothing. But, you will say, the stowage of the wine in this careless manner was not Harris's fault. It was the fault of the ship's master. True! But if you insure goods by a vessel which is not seaworthy, though neither by your fault nor the underwriter's, you must bear the loss.

I should add that this "warranty of seaworthiness" only extends to the time when the voyage commences. If you insure goods out to New York and a return parcel back to Liverpool, the vessel need only be seaworthy when she leaves Liverpool. If she is seaworthy then, your insurance is good, whatever happens to her afterwards. It is also to be observed that insurance policies run in two forms, "from" and "at and from." Thus, if I insure goods "from the port of Liverpool to Amsterdam," that is merely an insurance from the day of sailing. If I insure "at and from the port of Liverpool," that includes the time between the loading of the goods and the sailing of the vessel; so that in the latter case, if the ship should go down or in any other manner the goods sustain damage while the vessel is at anchor in the Mersey, my loss would be covered by the policy.

**Bills of lading.**—I do not propose in this chapter to consider the general effect of contracts that are called "contracts of affreightment"—that is, contracts whereby a person who is either the owner or hirer of a ship agrees to carry goods in that ship for a sum of money to be paid to him, which sum is called "freight." It should merely be noted that a contract between a shipowner and a merchant, whereby the latter agrees to furnish a whole cargo for a ship, is called a "charter-party," and the merchant who practically hires the whole space of the vessel, together with the services of the captain and crew, is called "the charterer." But when the agreement is merely to carry certain parcels of goods in a ship, the contract is contained in a writing called a "bill of lading," signed by the captain.

When a merchant charters a whole vessel, he also makes out a bill of lading for the goods shipped. So that in his case the bill of lading is merely an acknowledgment by the captain of the receipt of such-and-such goods, the contract showing the terms of carriage being contained in the charter-party. In the case of a merchant who only ships a parcel or parcels (*i.e.* not the whole cargo), the bill of lading is not only an acknowledgment that the goods have been shipped, but also contains the terms upon which they are shipped—*e.g.* the rate of freight. The following is a form of bill of lading :—

SHIPPED in good order and well conditioned by William Smith in and upon the good ship called the *Arethusa*, whereof is master for this present voyage Peter Hatchett, and now riding at anchor at Dover and bound for Newcastle, ten packages of woollen goods, being marked and numbered as in the margin, and are to be delivered in the like good order and well conditioned at the aforesaid Port of Newcastle, the Act of God, the Queen's Enemies, Fire, all and every other Dangers and Accidents of the Seas, Rivers, and Navigations of whatever nature or kind soever excepted, unto the said William Smith, or to his order or Assigns, on him or them paying freight for the said Goods at the rate of £     per hundredweight with Primage and Average accustomed. In Witness whereof the Master or Purser of the said Ship hath affirmed to three Bills of Lading all of this Tenor and Date, one of which Bills being accomplished, the others to stand void.

Dated in, etc.

Weight and Contents unknown.

You will observe that the last clause says, "the Master or Purser of the Ship hath affirmed to three bills of lading," all in exactly the same words, except



that one is marked "first," one "second," and the other "third." Now, the importance of the bill of lading to the man who has it is that it is the **document of title** to the goods; that is, the person who produces the bill of lading in proper order is entitled to have the goods delivered to him in the same way that the man who produces a bill of exchange (the holder, *see* p. 457) is entitled to have the sum named therein paid to him.

Let me take you through a transaction, to show you the importance of knowing thoroughly the effect of various dealings with bills of lading. Jonbull of Manchester writes to Cuzins, merchant of New York, ordering so many bales of cotton. I need hardly say that Jonbull does not send the money in advance; for the price is £800, and Jonbull is not so foolish as to part with his gold until he has seen the cotton. Cuzins ships the cotton on board the good ship *The Saucy Polly*, Captain Horser commanding, and takes a bill of lading, "Shipped, in apparent good order and condition by Jonathan Cuzins, in and upon the good steamship *The Saucy Polly*, now lying at the Port of New York and bound for Manchester, with liberty to call at any ports on the way for coaling or other necessary purposes, [so many] bags or bales of cotton, being marked and numbered as per margin, and to be delivered in like good order and condition at the port of Manchester unto *Jonathan Cuzin, his order or assigns*, he or they paying freight on the said goods on delivery at the rate of [     ] per bale." Please notice that the goods are not stated to be deliverable to Mr. Jonbull, the buyer, but to Cuzins himself, or his order, or assigns. You will see the reason presently.

The master or agent of the ship signs three of these bills of lading, one of which he keeps, returning the other two to Cuzins. Cuzins keeps one of the bills and sends the other to Jonbull. But Jonbull cannot, when *The Saucy Polly* arrives in the Manchester Ship Canal, go to the ship and claim the goods. Why not? Because the captain is bound to deliver only to *Cuzins, or his order, or assigns*. How, then, is Jonbull to get the goods that have been sent over for him? Well, he can only obtain them by producing to the captain a bill of lading indorsed by Cuzins. [I have told you on p. 481 that "indorsing" means signing one's name on the back of a document.] Cuzins indorses the third bill of lading, and sends it to an agent in Manchester along with a bill of exchange drawn on Jonbull for the price. The bill of exchange is in this form:—

£800.

New York,

January 2, 1898.

Seven days after sight pay to my order Eight Hundred Pounds sterling for value received.

JONATHAN CUZINS.

To Mr. William Jonbull,  
Merchant, at Manchester

Cuzins' agent takes this bill to Jonbull, who "accepts" it (*see* p. 456); and in return the agent hands over the bill of lading indorsed by Cuzins, which gives Jonbull the right to demand the cotton from the ship's captain.

Another way is to forward the indorsed bill of lading and the bill of exchange

to Jonbull direct, asking him to "accept" the bill of exchange. In that case, Jonbull has no right to use the bill of lading until he has accepted the bill of exchange.

A third way is for Cuzins to draw the above bill (or a similar one) on Jonbull, discount the bill at a New York bank, and give the bank the indorsed bill of lading as security. Then it works out in this way: Cuzins discounts (*i.e.* sells) the bill of exchange to the bank for (say) £785, handing to them the bill of lading for the cotton, duly indorsed by him. The bank send both these documents to their Manchester agents—for instance, the Manchester City and County Bank, who let Jonbull know of the fact, and send the bill of exchange for him to accept. If he accepts it, he obtains the bill of lading, by means of which he can obtain the cotton when it arrives in port, and will have to pay when his acceptance becomes due. That is, he pays £800. Thus, Cuzins gets his money (less £15) in New York without having to wait for it to be sent from England. The bank make £15 interest on their advance to Cuzins. Now suppose Jonbull will not sign the draft when presented to him, the bankers are quite safe; for they, being holders of the bill of lading, can sell it to someone else, or they can take delivery of the goods from the ship, and sell the goods. And unless the market has dropped, they will be sure to make enough to cover their £800.

**The rights of buyer and seller.**—Let us understand exactly the rights of the buyer and seller of goods in such a case as the one just given. When A orders goods from B, to be sent by ship or carrier, as soon as the goods are appropriated to the contract they become A's property. By "appropriation to the contract" is meant this kind of thing: A orders 1,000 cwt. of tobacco from B in Charleston, U.S.A. This is not an order of any particular 1,000 cwt., and it is impossible to say that the sale has actually taken place until B sets aside or labels 1,000 cwt. to meet A's order. Manifestly, as soon as B puts 1,000 cwt. on board ship, to be carried to A, there is a particular lot of tobacco appropriated or apportioned to the contractor. And as soon as the tobacco is put on ship-board it becomes A's.

But this ownership is subject to a right on B's part, the right, that is, to be paid for his tobacco. Now, if B puts the stuff on shipboard and the captain signs a bill of lading engaging to deliver the tobacco to A, B has lost his hold on his goods. His only right is this: If he learns, before the goods are delivered, that A is insolvent (not necessarily bankrupt, but unable to meet his creditors' demands as they fall due), B can give notice to the ship's captain not to part with the goods. This is called "**stoppage in transitu.**" But this right of the seller is liable to be defeated in the manner shown later (p. 736).

There is, however, a better way for B to secure himself, and that is to make out the bill of lading to his own order (*see* p. 732), and refuse to indorse it over to A unless A either pays cash or accepts a bill for the price. This is what I have explained in the last subsection. You observe, though, that the goods are A's as of right, provided that he accepts the bill or pays cash for them.

Now, suppose B has drawn a bill of exchange on A and sold it to a bank,



handing the bank at the same time the bill of lading of the goods. A has an absolute right to go to the bank and say, "I will accept the bill of exchange; and I demand the bill of lading so that I can get my goods"; and if the bank refuse, so much the worse for them. This was shown in a case of *Mirabita v. The Ottoman Bank*. A man in (I think) Constantinople shipped goods to Mr. Mirabita in England, and drew a bill on him for the price. This bill he sold to the Ottoman Bank, and handed them the bill of lading of the goods as security. The Bank sent over the bill of lading and bill of exchange to their Liverpool branch, and the branch manager sent a note round to Mirabita asking him to call and sign the draft, when the bill of lading would be handed over to him. For some reason or other, Mirabita refused to accept the draft at first, and, of course, did not get the bill of lading. But a few days afterwards the merchant changed his mind, called round at the Ottoman Bank, offered to sign the acceptance, and asked for the bill of lading. Now the bill of lading was still in possession of the Bank, but the market had gone up, and the goods were worth more than they had been at first. Wherefore the Bank refused to accede to Mr. Mirabita's request, saying, in effect, "You had a chance of accepting the draft and taking the bill of lading a few days ago, Then you refused. Now we refuse." And so the Bank presented the bill of lading to the captain of the ship, obtained the goods, and sold them at a very good price. Then Mirabita brought an action against them to recover damages—that is, the profit he would have made according to the market price on the day when he offered to fulfil his contract. And Mirabita won, the Court holding that the goods were his, subject only to the Bank's right to have the bill of exchange duly accepted by him. The case would, I think, have gone differently had the Bank, immediately on Mirabita's first refusal, sold the cargo (or the bill of lading, which is the same thing).

In such cases as those given above, when the seller of goods draws on the buyer for the price, and makes it a condition that the draft shall be accepted [or paid] before the bill of lading is handed over, the goods do not become the property of the seller until he has accepted [or paid] the draft. The result of the rule is this: that should the buyer persuade the ship's captain or agent to deliver the goods to him before acceptance [or payment] of the bill of exchange, he (the buyer) is doing wrong. He is, in fact, just in the position of a mere stranger to the contract who, by some means or other, obtains the goods. And he will be liable to pay their full value to the seller—*full value*, mind; not the agreed price. Thus, A orders flour from B, of New York—price, £1,000. B ships the goods on board the *Alaska* in the usual way, taking the usual bills of lading, which makes the goods deliverable to B or his order. Then B draws a bill of exchange on A: "Ten days after sight pay B £1,000, value received." This he sends to A to be "accepted," and at the same time sends an indorsed bill of lading, the possession of which will authorise A to demand the goods from the captain of the *Alaska*. A keeps the bill of lading, but does not "accept" the accompanying draft. He goes down to the dock, produces his bill of lading, duly indorsed by B, and receives the flour. This is a wrongful act. Now, suppose the price of flour has gone up, and the

cargo which was worth £1,000 when shipped can be sold in Glasgow for £1,700 the day it arrives. A is liable to pay to B the whole £1,700. "Why?" you ask. "Will it not be enough if he pays the £1,000 originally agreed?" No, it will not. For the flour remained the property of B until A had "accepted" the bill of exchange; and therefore if A touches that flour before he has "accepted" the draft, and sells it, he is seizing and selling B's flour; and, of course, if I seize and sell your flour, I must pay you the full value of it at the date upon which I seized it.

**The transfer of a bill of lading: negotiability.**—I have told you, in discussing the law of the shopkeeper (at p. 673), that unless credit has been agreed to be given, the seller can always refuse to part with the goods until the price is paid. Now when goods are put on shipboard or delivered to a land carrier to carry to the buyer, this lien, or right of retention, has obviously gone. True, the seller may protect himself, as shown in the preceding pages, by making the bill of lading or delivery note to himself or his own order, and refusing to indorse it to the buyer until he is paid. But suppose there is nothing of the kind done. Suppose I write to Macpherson of Paisley and order 100 of the famous shawls at £8 a piece. Macpherson, not doubting my ability and willingness to pay, makes up the parcel of shawls and hands them to the Clyde Shipping Company, addressed, "Mr. Joreboanz, 258, Old Square, Lincoln's Inn, London, W.C.," with a bill of lading made out to me. One copy of the bill of lading is sent on to me. The shawls are now my property, because they were delivered to the carrier unconditionally. But a few hours after the despatch of the goods, Macpherson hears that I have "come a cropper"—i.e. 2½d. in the £. The shawl-merchant has the right to write or telegraph to the Clyde Shipping Company at the London office countermanding delivery. This is another instance of stopping the goods in transit. Now, if the shawls are still in the hands of the Clyde Shipping Company, in course of being carried to me, this stoppage is effectual. If, however, the goods have been actually delivered to me, or if I have taken possession of them in any way, the stoppage is ineffectual. For example, suppose the ship is in the Thames, the parcel is landed, and I am there to meet it. I say to one of the Clyde Shipping Company's clerks, "Warehouse this parcel till to-morrow." I have constructively taken possession, and the Shipping Company hold the goods as my agents; and if Macpherson telegraphs a countermand, it is of no avail.

Seeing that this right of stoppage only exists while the goods are in course of transit from seller to buyer, it becomes important to consider **when the transit ends**. In the first place, it ends when the buyer or his agent takes delivery from the carrier; in the second place, even if the buyer or his agent obtains delivery, before the goods arrive at their appointed destination; thirdly, when the goods arrive at their destination and the carrier (or warehouse-keeper, etc.) acknowledges to the buyer or his agent that he holds the goods at the buyer's disposal. For example, Brown sends to you, a coal merchant, ten trucks of coal, per rail. You, of course, have to cart the coal from the railway dépôt. The usual course of business is for the railway company, when the trucks arrive, to send you a notice somewhat in this form: "We hold to your order ten



trucks of coal consigned to you by Brown & Co. of Cardiff"; and then follows a statement that you will have to pay so much per day per truck so long as the coal remains at the depôt. This notice to you puts an end to the transit, and Brown cannot stop delivery if you should become insolvent, though you have not paid the price. And suppose that after the receipt of the note you reply to the railway company, "Send the ten trucks of coal to the goods station at Middleton, to my order." This is immaterial: the transit is at an end so far as Brown is concerned, because the company are now carrying the goods for you. In the fourth place, if the carrier wrongfully refuses to deliver up the goods to the buyer, the transit is at an end. For example, Brown forwards to you ten trucks of coal—not paid for, you paying carriage. The railway company want to charge you £20 for carriage, when the proper charge under their Act of Parliament is £17. You offer the £17, but they refuse delivery until £20 is paid. The transit is at an end, and Brown cannot stop delivery to you.

*Transit is not at an end* when the buyer rejects the goods, and the carrier takes them back to the seller, and the seller refuses to receive them back; so that they remain in the custody of the carrier.

*It is doubtful*, sometimes, whether transit is over or not; and the usual case is where the buyer of the goods chartered a ship and sends that ship for the merchandise. The question arises whether the seller can give notice to the master to stop the goods before they are delivered to the buyer at the port of discharge. If you are the seller and wish to be sure of your ground, get the master of the ship to sign a bill of lading in the form given on p. 731, making the cargo deliverable to your order. It will then be clear that you have not parted with the control of them, because no one can claim the cargo unless he produces the bill of lading, duly indorsed by you.

There is another and more common way of **defeating this right of stoppage**, namely, by the buyer obtaining the bill of lading, and selling, or pledging, or depositing it with some other person. Thus, if in the circumstances detailed in the preceding page, while the goods are still on the voyage down the St. George's Channel, I sell the bill of lading outright to Smith, Macpherson's right of stoppage is gone. If I pledge the bill of lading with Jones, as security for a loan of £300, Macpherson's right has not gone altogether; but Jones is entitled to £300 worth of the goods to cover his loan.

And in every case where a document of title has been lawfully transferred to the buyer of goods, and the buyer re-transfers it to someone who takes it for valuable consideration (i.e. money or money's worth) and in good faith, the right of the last-mentioned person to the goods is perfect, although the goods have not been paid for. Mind, this does not apply to a stolen bill of lading. If you buy a stolen bill of lading it will do you no good at all.

And the same law applies not only to bills of lading, but also to all other documents of title to goods, such as dock warrants, warehouse-keeper's certificates, delivery warrants on orders, and all other documents of the same kind used in the ordinary course of business as proof of possession or control of goods, or purporting to authorise the possessor of the document to transfer or receive

goods thereby represented. Thus, if goods are sent to you in London, and you warehouse them at a warehouse-keeper's, he gives you a certificate that he holds such-and-such goods "to your order." If you indorse your name on this certificate and hand it to me, I can go to the warehouse and demand the goods. And it is a common thing for goods to be sold by merely selling the certificate. Now, it is just possible that those goods were not yours, either because you had agreed that they should not be yours until you paid for them and you have not paid, or for some other reason. But if I give value for the piece of paper, and have no knowledge but that you have a right to sell it, I can always obtain the goods from the warehouse.

**Lien or right of retention for the price.**—When you sell goods, without having expressly agreed to give credit, you can always retain them and refuse to part with them until the price is paid. And if your customer does not come forward and pay within a day or two, you should give him notice that unless he pays and takes delivery within such-and-such a period (according to the kind of goods in question) you will resell them and hold him liable for any loss. Then, if he does not claim the stuff and pay the price within a reasonable time, you should sell, and charge him the difference between the amount realised and the price he agreed to pay. When goods are perishable you can re-sell them without giving any notice.

As soon as you let the goods go out of your hands you have lost your right, even though you afterwards get them back. To take the common case:—Brown of Birmingham has given you an order for £500 worth of goods (say tinned lobster). You can, if you like, after making up the parcel, decline to put it on the rails until you have been paid. But suppose you have delivered the packages to the L. & N.W. Railway Co. to be carried to Birmingham, you have no right to go afterwards to the Company and ask them to give you the goods back. True, you have the right of stoppage in transit; but that only arises when Brown is insolvent. In other words, having once parted with your goods to the carrier you can do nothing unless Brown becomes insolvent. If you order the Company to stop the goods in transit and it turns out that Brown was solvent at the time, so much the worse for you; because Brown will compel you to pay damages for non-delivery and also compensation for any expense he was put to in trying to obtain the goods. And you will not have much sympathy from anybody in the Court, because you have attacked Brown's credit without justification—the mere fact of a stoppage of goods in transit being a clear insinuation that Brown was insolvent.



## CHAPTER IX.

### THE LAW OF THE FARMER AND MARKET-GARDENER.

What is an agricultural holding—Notice to quit different from ordinary tenancies—Removal in Scotland when rent in arrear—Distress for rent—Only one year's arrears—Things not seizable—Crops—The nurseryman's advantage—Beasts of the plough—The plough itself—Sheep—Live stock taken in to be fed at a price—"Milk for meat" is a fair price—Machinery on hire—Breeding-stock—Fixtures—Tenant's privilege under Agricultural Holdings Acts—The landlord has right of pre-emption—Time for removal of fixtures—Compensation for unexhausted improvements—Three classes of improvements—Class I.: Landlord's consent required—Class II.: Landlord has option of doing—Class III.: No consent required—The tenant can "contract out" of the Act if the contract is fair and reasonable—How and when to claim compensation—Importance of giving proper notice—What is the "determination of the tenancy"?—Effect in cases of bankruptcy—Landlord's counter-notice, claiming compensation for breach of agreement—Deductions from tenant's compensation—What is a "proper return" of manure to the land?—Scale of compensation for manures—The question of compensation to be referred to arbitration—How it is done—The control of the Court—Award must be in writing—Must be ready within a limited time—Must give the particular items awarded—Costs and expenses of the reference—Time for payment of compensation—Appeal from the award—Amount of compensation is the value to incoming tenant—Incoming tenant sometimes pays outgoing tenant, and stands in his shoes—Sporting—Hares and rabbits—Tenant and person authorised by him may shoot—Who may be authorised?—Good news for friends of farmers—Not allowed to kill ground game anyhow—Hedges, ditches, and fences—Rates—Relief from Imperial funds.

FOR the purposes of the Agricultural Holdings Acts, 1883 (England and Scotland), a **holding** is a holding that is either wholly agricultural, or wholly pastoral, or wholly used as a market-garden; or partly agricultural and (as to residue) pastoral or cultivated as a market-garden. Queerly enough, nothing is said about a holding which is partly pastoral and partly a market-garden, but I think the Acts are wide enough in their terms to include these.

Any holding let to a tenant during his continuance in any employment under the landlord is not entitled to the benefit of the Acts. By virtue of this exception it comes about that, if James Jassman takes employment under Squire Shallow, J.P., as his bailiff at a salary of £100 a year and a little farm rent-free, he cannot, when he leaves the farm, claim any compensation for unexhausted improvements effected at his own expense. He cannot remove fixtures, such as barns and fixed machinery put up at his own cost, simply because he holds the farm "during his continuance in the office, post, or employment" of bailiff to the landlord. Thus it will be seen that the Acts apply to land occupied by graziers, by market-gardeners, and by farmers, and to holdings where the tenant combines two or all of these occupations.

**Notice to quit** in the case of ordinary householders has already been dealt with (*see* p. 137). But in England the tenant of an agricultural holding (farmer, market-gardener, dairy-farmer, grazier) is subject to different rules. In the case of yearly tenancy, an ordinary tenant is subject to removal at six months' notice, expiring at the end of a current year of the tenancy. This used to apply all round; but the English Agricultural Holdings Act altered the six months to a year in the case of agricultural tenancies. So that a farmer or market-gardener who is a yearly tenant must give and take a year's notice, expiring at the end of a year of the tenancy. Thus, a tenant who enters at Michaelmas can only give notice at Michaelmas, to expire at Michaelmas. But this state of things can be altered by an express agreement between landlord and tenant that a greater or less period of notice shall be given.

In Scotland, when a tenant holds under a lease for three years or more, the tenancy does not come to an end when the lease is up, unless either landlord or tenant has given written notice to that effect at least a year and not more than two years before the end of the lease. Thus, Macnaughton holds a farm under a lease for seven years from Whit Sunday, 1890, expiring Whit Sunday, 1897. Unless, however, he gave his landlord notice in writing on or before Whit Sunday, 1896 (but not before Whit Sunday, 1895), that he intended to leave at the end of the lease, he cannot leave. And unless the landlord gave him the like notice, the landlord cannot turn him out. Leases from year to year or for less than three years require six months' notice to terminate them, under the Act. Failing the notice, there is to be a continuation of the tenancy for another year; and this requires six months' notice to determine it.

It should be said that nothing in the Act touches the right of the Scottish landlord to turn the tenant out if the latter has forfeited his lease by not paying rent, or by breaking his contracts, or is liable to be removed because he has been sequestrated under the Bankruptcy Act.

In Scotland, also, an agricultural tenant can be **removed for non-payment of rent** under these conditions:—(1) The landlord's right of hypothec must have ceased; (2) six months' rent must be due and unpaid. It is not to be supposed, however, that the landlord can go in and turn the poor farmer or gardener into the road. He must begin an action in the Sheriff's Court, and can obtain an order for the tenant to go out on the following Whit Sunday or Martinmas. But the tenant may save himself by paying up all the rent due up to the date when he is ordered to go out, or by finding caution (England, security) for the rent up to date and one year over. It is for the sheriff to say whether the caution proffered is sound enough. If he likes the security, well and good; he must allow the tenant to remain. A tenant turned out by the sheriff's order has the same rights of compensation for improvements and with regard to fixtures as he would have had if his tenancy had expired in the ordinary way on the day on which the sheriff compels him to remove.

In the matter of **distress for rent** (in England), the farmer and market-gardener are privileged beyond the usual lot of tenants. The landlord of such is only entitled to distress for rent which became due in respect of the holding **within a year** before the making of the distress. Thus, Giles is the



tenant of Blackacre Farm, his rent being due and payable yearly on the 29th of September. In 1896 Giles is unable or unwilling to pay. His landlord can distrain for the rent due on the 29th of September, 1896, any time up to and including the 28th of September, 1897, but not afterwards. Except on agricultural holdings, six years' rent may be distrained for.

To this rule there is the inevitable exception—founded, I suppose, on the principle that you must try to make your law square with the habits of the class legislated for. It is the custom of the country in some parts of England for the landlord to wait for his rent for a quarter or half a year after it is due. The custom is founded on the habit of farmers to pay rent out of the proceeds of the corn crop. Consequently, although the tenant may have entered in March, and his rent may be due on the 25th of that month in each year, the custom of the country allows him until the September quarter-day in which to pay. On other estates, although there is no legal custom, it is the practice of the landlord to collect all his rents in September, no matter when they became due. Whenever this is the case, and either by custom or by a recognised course of dealing, the tenant has been in the habit of paying his rent a quarter or half a year after it is legally due, the landlord can distrain within the year, counting from the usual day of payment, and not from the day when the rent is lawfully due.

I am not to be supposed to be laying it down as law that the landlord can only distrain on an agricultural holding for one year's rent. He may be entitled to distrain for more. Thus, Giles holds his farm from Lady-day to Lady-day, the rent being legally due half-yearly on the 25th of March and the 29th of September. By the custom of the estate, however, the landlord allows his tenants to pay their whole year's rent in September. In September, 1897, therefore, Giles will owe two half-years' rent. He continues to owe it, and the landlord takes no immediate steps. But by the 26th of March, 1898, Giles not having paid his rent, three half-years' rent is in arrear; and the landlord sends the bailiffs in. Note, please, that under the Agricultural Holdings Act the landlord has the right to distrain for rent due for a year counting backwards from the date of the distress (March 26, 1898); but, by virtue of the clause set out in the last paragraph, the rent due on the 25th of March, 1897, is to be counted as though due on the 29th of September. Therefore the landlord can distrain for the whole of the three half-years' rent on the 26th of March, 1898.

**Do not imagine**, either, that the landlord loses his right to the rent if it is not paid, and he does not send the bailiffs in within the year. By no manner of means. But the rent has become an ordinary debt and can only be recovered by putting the tenant in the Court for it.

Besides the limitation on the landlord's right to distrain for arrears, there is another difference between the position of the farmer and the market-gardener and that of any other tenant—namely, as to the **things distrainable** when the bailiffs put in their unwelcome appearance. By the old common law of England crops of corn, whether growing or in cocks or sheaves, loose, or in straw, or hay in a barn, or granary, or on any stack, could not be distrained for rent. Growing crops could never be seized, because the landlord had only the right to

take "chattels"—that is, movable goods; and anything growing in the soil was considered to be part of the soil.

The first alteration of this rule was made by an Act passed two years after the Revolution—the "great and glorious" revolution it is always called by writers of that era. The Statute in question gave the landlord **the right to distress on cut crops**—that is, sheaves or cocks of corn; corn loose or in the straw; hay in a barn or granary, or upon any hovel, stack, or rick, or otherwise upon any part of the land. But the person distraining must not remove the corn or hay. He must impound it where it is on the farm, and, after waiting the proper time (*see* p. 145), to see whether the tenant redeems his property by paying the rent, he may sell the stuff seized.

The landlord's right was further extended, by an Act passed in the reign of George II., to **growing crops**. The Statute gives the landlord power to seize "all sorts of corn and grass, hops, roots, fruits, pulse, or other product whatsoever," growing on the holding; to cut and gather such produce when ripe; to store it in the barns and buildings in the place, or if there are none, then in some barns or buildings to be hired; and eventually to sell it. It should be observed that the landlord has no right to cut or gather the products until they are ripe. Secondly, he cannot sell until he has harvested.

The **nurseryman has the pull** over the farmer and market-gardener; for it was held in two cases that the Act gave no right to a landlord to seize, uproot, and sell the trees of a nurseryman. In one case the landlord argued that he could take such trees, because the Act says "corn and grass . . . . or *other product* whatsoever." But the nurseryman's lawyer was too much for him. "Other product," said he, "must mean other product of the same kind as the corn, grass, hops, roots, fruits, and pulse specified in the previous part of the sentence" (*see* p. 291). "Besides," he added, "the landlord's right is '*to cut, gather, cure, make, carry and lay up when ripe.*' One does not either 'cut,' 'gather,' 'cure,' 'make,' 'carry,' or 'lay up' young trees. The Statute clearly points only to such crops as ripen and are harvested and laid up. Now, young trees do not ripen; you do not harvest them; nor do you lay them up in barns." This argument prevailed. So that the nurseryman may be more easy in his mind if his rent is behind than the ordinary mortal, for the most valuable part of his stock-in-trade cannot be touched. And not only trees, but shrubs, plants, and, indeed, every other kind of garden produce except such things as potatoes, carrots, peas, and other things of which you take a crop when ripe, are exempted from distress.

**Beasts of the plough, instruments of husbandry, and sheep** are only distrainable where the farm contains no other distress sufficient to pay the rent and expenses; and the **instruments of the farmer's trade** are also privileged to the same extent. If the instruments of trade, *e.g.* spades, forks, carts, ploughs, are in actual use, they cannot be taken at all. As I have said before, growing crops may be seized, but cannot be sold until they have been gathered in; and cannot be gathered in until they are ripe. A case once happened in which arrears of rent were due, and the farmer had scarcely anything on his place except his beasts of the plough and a growing crop of wheat. The wheat was then green. The landlord was in a dilemma. If he took the beasts of the plough, when



the growing wheat was there, he might be doing wrong. If he seized the wheat he would have to wait three or four months before he could cut and sell it. He chanced it and took the beasts. The tenant fought the case, but the judge decided that the landlord was right. If there is nothing else immediately available, beasts of the plough (and, I suppose, implements of trade) may be taken.

I may perhaps be allowed to add that beasts of the plough can be distrained for **poor-rate**, though there are plenty of other goods on the place to pay the rate.

Any reader who wishes to see the rules applicable to distress for rent will find them in Chapter I. of Book II., at pages 142-147. The general rules there set forth apply to farmers and market-gardeners; and, in addition, the rules just given, and those immediately following (under the Agricultural Holdings Act) are specially applicable.

Under the Agricultural Holdings (England) Act, "**live stock taken in to be fed at a fair price**" are exempted from distress for rent. Such stock are absolutely exempt if there is any other sufficient distress on the holding; that is, if the landlord can find any other cattle, crops, or other things on the land, sufficient, when sold, to satisfy the rent and expenses of distraining, he must leave agisted stock alone. To "agist" means to take another man's beast on to your land under a contract that you will feed it. In one case a farmer entered into an agreement that, in consideration of £2, he would allow the owner of cattle "the exclusive right to feed the grass on the land for four weeks." It was decided that this was not an agreement to agist the cattle, but an *exclusive* letting of the grass land. An agreement is not an agreement for agistment if the cattle-owner is to have the exclusive right to turn cattle into a certain field to feed. And so the Court held that the cattle in this case were not protected by the Agricultural Holdings Act, but could be distrained.

Then what does a "fair price" mean? It is a common agreement enough for a farmer to take cows on his land for the terms of "**milk for meat.**" That is, he feeds the animals in return for their milk. In a North-country case, a farmer had taken cows on these terms. His landlord then put in a distress and took the cows. The owner of the cattle rather objected to have his good beasts sold to pay some other man's rent, and he therefore claimed them under the Agricultural Holdings Act, as "stock agisted at a fair price." "Fair price!" said the landlord. "You don't pay anything at all. What? The milk? Oh! ho! my good sir! 'price' means money, not milk." But the Court of Queen's Bench did not agree with this grasping landlord. Milk in exchange for meat is a "fair price," as their lordships had no difficulty in deciding.

If there are no other stock, crops, etc., on the farm sufficient to satisfy the rent, the landlord's only course with regard to agisted stock is to demand the agistment money from the cattle-owners, and the latter must pay him instead of paying the farmer. Thus, if Brown puts cattle on Giles's farm to be fed by Giles for two months for £3, and Giles's landlord distrains for rent, the

utmost he can do is to compel Brown to pay the £3 to him instead of to Giles. If Giles was artful enough to get paid in advance, the landlord can do nothing.

A second class of things exempted by the Act is **agricultural or other machinery on hire** by the tenant for use in his business; and a third exemption occurs in the case of **breeding-stock**—that is, live stock not belonging to the tenant, and on his premises for breeding purposes only.

Fixtures cannot be distrained on, because they are part of the land until they are severed from it.

**Fixtures.**—I have told you, in the chapter on the Householder and his Landlord (p. 164), that in law, both in England and Scotland, what is affixed to or built in the soil becomes part of the soil—a rule of law based on the doctrine that when two things are fixedly united together, they belong to the person who owns the principal one. It is a mighty fine rule for the man who owns the soil. You already know that the householder may remove anything lightly fixed by him to the house for temporary ornament and convenience; and that the rule has been further relaxed in favour of trade. For the judges have held that “trade” fixtures are removable by the trader so long as he does not destroy the landlord's property.

In 1802 a case occurred which raised the question of the right of agricultural tenants to remove fixtures put up by them. Farmer Elwes had rented a farm in Lincolnshire from a Mr. Maw; and during the tenancy had put up at his own expense a beast-house, a carpenter's house, a pigeon-house, and a number of other buildings and fixtures, all for the purposes of the farm. At the end of the tenancy the farmer asserted his right to pull down and carry away the buildings, etc., that he had put up.

I need hardly remark that all the things in dispute were really built into the soil or into some part of the farmhouse. Otherwise no question could have arisen; for, in order to constitute a fixture, the article must be let into or united with the land. It is not enough that it should have been laid upon the soil. Something more is required; as that the soil shall have been displaced for the purpose of receiving the article, or that the article shall be cemented or otherwise fastened to something previously attached to the ground. If, as in one case, there is a brick foundation let into the soil, and on top of that some blocks of wood, with a wooden barn simply resting on, but not fastened to the blocks of wood, the barn is not a fixture, and the landlord can have no possible claim to it as against the tenant who erected it.

In the case of Elwes and Maw, the farmer claimed that his beast-house and other fixtures were trade fixtures, just like the machinery of a cotton-spinner; but the Court would not have it. Farming, it appears, is not a trade. But a nurseryman, as we have seen, appears to be a trader, because he can carry away as trade fixtures any shrubs, box borders, plants, etc., which he himself has put in. From 1802 to 1883 a farmer had no right to remove fixtures and buildings erected by himself on the farm, unless, of course, he had been wise enough to make a contract with his landlord to that effect.

The right of agricultural tenants has, however, been placed on quite a



different basis by the **Agricultural Holdings Acts, 1883** (England and Scotland). Those statutes give the tenant the right to remove any "engine, machinery, fencing, or other fixture, or any building for which he is not entitled to compensation." The fixture or building must have been put up after the commencement of the Act. And it must have been put up of the tenant's own accord—that is, not in pursuance of any agreement made with his landlord. For instance, suppose when the tenancy was entered into the tenant agreed to erect a fence round Ten Acre Field, or to build a new cowhouse, he cannot take away the cowhouse or fencing. He is supposed to have agreed to erect them for the landlord, and to have got in exchange some allowance or concession. Again, if the fixture or building is put there by the tenant instead of some fixture or building belonging to the landlord, it is the landlord's property, and the tenant cannot take it away.

There are certain **conditions annexed** to the right to remove agricultural fixtures. (1) Before the removal the tenant must pay his rent and do everything that his lease requires him to do. (2) The holding or farm buildings belonging to the landlord must not be unnecessarily knocked about. (3) Any damage done in removing fixtures or buildings must be made good immediately. There is one other condition—namely, that **the landlord has a right of pre-emption**; for it may very well be to the interest of both parties that the fixture or building shall remain where it is. The landlord may be of opinion that it adds to the value of the farm or market-garden; and it will probably pay the tenant just as well to leave his fixtures behind if he gets a fair price for them. It does not require much knowledge or intelligence to perceive that it may cost almost as much to remove the things as they are worth. Moreover, a farmer may be going to a holding already well provided with buildings and machinery. Or he may contemplate removing to a distant part, or even giving up business altogether.

In any case, he can remove nothing without giving a month's notice in writing to the landlord of his intention to remove it. The notice ought to contain a list of the things intended to be removed. If this essential requisite is complied with, any form of notice will do. For instance:—

Bleak Farm, Hamlet,

February 1, 1898.

Sir,—I beg to give you one month's notice that, on the expiration of my tenancy of this farm on Lady-day next, I intend to remove the buildings and fixtures comprised in the schedule hereto.

I am, yours truly,

WILLIAM GILES.

*Schedule.*

- (1) Cowhouse in yard.
- (2) Small barn in stackyard.
- (3) Wooden fence round five-acre meadow.

(Naming each thing.)

A tenant who attempts to move his fixtures without giving the month's notice loses his right to remove and is guilty of "waste"

At any time before the tenant's notice of removal has expired the landlord may give him a counter-notice in writing, electing to purchase any of the fixtures or buildings comprised in the tenant's notice. All the fixtures or buildings that the landlord thus elects to purchase become his absolute property. The tenant has no longer the right to remove them, but he acquires a new right—namely, that the landlord shall pay whatever may be the fair value of the things purchased to an incoming tenant. What does this mean? It means the reasonable price which a reasonable tenant would be willing to pay for the fixtures as they stand. It does not matter what they cost the outgoing tenant. He may have paid more or less than a fair value. If the landlord and the tenant cannot agree between themselves what the fair value is, the price is to be fixed by a reference in the same way as in a case of compensation under the Act (*see* pp. 753-7), but without appeal.

I would add that if the landlord does not pay the price fixed, this does not give the tenant any right to remove the fixtures. For as soon as ever the landlord gives notice to purchase, the fixtures comprised in that notice are no longer the tenant's property. His only remedy is to sue the landlord for the price.

**Time for removal.**—As I have said on page 166, the householder is bound to carry away his tenant's fixtures before the expiration of his tenancy, unless he wishes to make a present of them to the landlord. Not so the farmer and market-gardener. The fixtures removable under the Agricultural Holdings Acts can be taken away either before or within a reasonable time after the determination of the tenancy. This is a most important privilege, not possessed by any other class of tenant.

**Compensation for unexhausted improvements.**—Before the Agricultural Holdings Acts, tenants in England and Scotland were not entitled to claim from the landlord any compensation for improvements made by them in their holdings, except by **custom of the country**. On both sides of the Border, however, there were districts possessing customs under which agricultural tenants might claim such compensation. On page 326, *et seqq.*, you will find fully described and defined the requisites of a valid custom. One of these requisites is reasonableness; and it has been decided to be an unreasonable custom that the tenant shall look for his compensation to the incoming tenant instead of to the landlord. The Agricultural Holdings Acts to some extent diminish or take away the tenant's rights under these local customs. For if the Acts deal with anything, the compensation provided by the Acts is in substitution for anything previously allowed by custom; but where the custom allows compensation for something not dealt with by the Acts, the tenant can still claim under the custom.

Perhaps the most important privilege conferred on farmers and market-gardeners by the **Agricultural Holdings Acts** is the right to compensation for unexhausted improvements. These Acts began to apply in England and Scotland on and from the 1st of January, 1884; and there are different rules applicable to improvements executed before and improvements made after that date.



There are three kinds of improvements specified in the Acts, to which different rules apply. For all of them the tenant is entitled to receive compensation from the landlord at the end of the tenancy, but subject to somewhat differing conditions. I will call these classes first, second, and third, and will distinguish such of them as apply to England or Scotland only. Those not marked apply to both countries alike.

With regard to the **first class**, the tenant cannot claim any compensation at all unless he has obtained **the landlord's consent** to do the act which results in the improvement. The way the section works is this:—The tenant who wishes to make a first-class improvement must ask for the landlord's consent, and unless he obtains that consent in writing from the landlord or the landlord's agent, he had better not spend his money. For if he makes the improvement first, and asks the landlord or agent's consent afterwards, he will not be able to claim any compensation. The landlord may consent upon whatever terms he pleases. Thus, he may say, "I consent, provided I am not hereafter called upon to pay more than £—— for the improvement." A common form is for the landlord to consent upon condition that he finds the material and the tenant the labour; or that the landlord deducts a trifle from the rent for so many years. If no special agreement is come to, the tenant will be entitled to the compensation given by the Act (*see below*).

## I.

### *List of improvements to which landlord's consent is required.*

- (1) Erection or enlargement of buildings.
- (2) Formation of silos. (Air-tight receptacles for preserving green food for consumption by cattle in the winter.)
- (3) Laying down of permanent pasture.
- (4) Making and planting of osier beds [England only].
- (5) Making of water meadows or works of irrigation.
- (6) Making of gardens.
- (7) Making or improving of roads or bridges.
- (8) Making or improving of watercourses, ponds, wells, or reservoirs, or of works (for the application of water-power or) for supply of water for agricultural or domestic purposes. [The words in brackets are only in the English Act, not the Scottish.]
- (9) Making of fences [England]. Making of permanent fences [Scotland].
- (10) Planting of hops [England].
- (11) Planting of orchards or fruit bushes [England].
- (12) Reclamation of waste land.
- (13) Warping of land [England]. (Putting on the land, by means of artificial banks and channels, the deposit of mud left by tidal rivers. This mud is very fertilising.)
- (14) Embankment and sluices against floods [England]. Weiring or embanking of land against floods [Scotland].

Now, as to the **second class** of improvements mentioned in the statutes, I am somewhat reminded of the candidate for municipal honours who hired a hall for a meeting, but found himself the only person present. So he moved a resolution of confidence in himself and his candidature, seconded it, put it from the chair, voted for it, and then went home and told his wife that a resolution in his favour had been carried, after a struggle, by a majority of one. For the second class of improvements is a class of one only, namely—

## II.

**Drainage.**—The peculiarity with regard to compensation for drainage is that, in effect, the landlord can either be compelled to do the work himself, or else he must allow the tenant to do it. Suppose you are a farmer or market-gardener part of whose holding is badly drained or not drained at all, and you want it drained properly so that you may get the full benefit of the land. Let me tell you what to do. First, consider exactly *what* it is that ought to be done and *how* you will do it if it be done. When your scheme is matured in your own mind, commit it to paper. Be sure not to be too hasty about it, because you must send to the landlord a written notice of your intention to drain and the manner in which you propose to do it.

The very greatest **care is necessary in drawing up this notice**; because if you do not state exactly what you want to do, and how you intend to do it, your notice is bad. And if you deviate, in executing the work, from the plan you laid down in your notice, you have put yourself outside the protection of the Act. The best thing to do is to call in a practical surveyor and get him to undertake the job of drawing up the notice. He will make a proper plan for you, and draw up a notice, as thus:—

I beg to give you notice that I intend within three months to execute the following drainage improvement:—

*Area to be drained.*

Five-acre field.

*Mode of drainage.*

Main drains as shown on plan annexed, 9-inch pipes, depth 4 to 6 feet. Main drains — feet apart, having a fall of — feet. Cross-drains, 6-inch pipes; depth, 3 to 4½ feet, and — feet apart; fall of — feet.

and so on for every held.

**You must not start work** until at least two months have elapsed since the day when you gave the notice. On the other hand, if you intend to start at all, you must start within three months of the time when the notice was given. Thus, if you give notice on the 1st of September, you cannot begin to execute the drainage until the 1st of November, and you must begin to do it before the 1st of December; otherwise your notice falls through, and you will be obliged to give a fresh one. If you begin to work before the two months are up, or after the three months, you make a present to the landlord of all your labour and expense, for you have lost the benefit of the Act.

When due notice is served upon the landlord, it is open for him to try to make an arrangement with the tenant, either for sharing the expense of the improvement or for the compensation to be paid. That is to say, the tenant may agree that he will pay a proportion of the total cost and the landlord the rest; or that he (the tenant) will accept a sum down, now, instead of future compensation when he quits the holding. Any agreement, in fact, may be come to, and generally the matter is arranged without trouble. But be careful to make the agreement with the landlord himself, not with an agent.

Where, however, no friendly arrangement is arrived at, **two courses are**



open to the landlord. He can (unless the tenant withdraws his notice) give an undertaking that he himself will carry out the improvement. If he does so carry it out, he can charge the tenant an extra rent amounting to 5 per cent. on the outlay. Thus, if the draining costs him £100, he may add £5 a year to the tenant's rent. Or he may charge him in a lump sum the whole outlay, spread over a period of twenty-five years, with 3 per cent. interest, and recover the amount annually as rent. Thus, suppose an improvement cost £100, the landlord can charge the tenant £4 a year, as extra rent on the capital, together with 3 per cent. interest—altogether £7 the first year; £6 17s. 6d. the second year; and so on. The interest diminishes each year, because £4 a year is paid off the principal.

Or instead of doing the work himself, the landlord can leave the tenant to do it. It is not necessary, understand, for the landlord to consent to the tenant doing it. The tenant has the absolute right to drain his land, after notice given, unless either the landlord executes the improvement himself or comes to some arrangement about it. Consequently, if the landlord passes the notice by in silence, let the tenant begin his improvements as soon as the two months are up.

It is quite open for the landlord and tenant to dispense with the two months' notice, either by a clause in the lease, or by any other agreement.

The law as stated so far is for both countries alike; but there is one proviso **specially Scottish**, a proviso, however, that will become of less and less importance as the years roll by. It is this:—If you are sitting under a lease or relative writing made prior to the passing of the Act (*i.e.* prior to the 1st of January, 1884), and by that lease or writing have agreed with your landlord that you shall not have any claim for any outlay on drainage beyond a certain sum, you can in no case claim more than the limit fixed.

The **third class** of improvements is on quite a different footing from the first and second classes, in that you need give no notice to the landlord before you do them, still less need you obtain his consent to their being done. The list of the improvements under this heading is as follows:—

### III.

- (1) Boning of land with undissolved bones.
- (2) Chalking of land [England only].
- (3) Clay-burning [England only].
- (4) Claying of land.
- (5) Spreading blaes upon land [Scotland only]
- (6) Liming of Land.
- (7) Mailing of land.
- (8) Application to land of purchased artificial or other purchased manure.
- (9) Consumption on the holding by cattle, sheep, or pigs of cake or other feeding stuff not produced on the holding.

There is another difference between Class III. and Classes I. and II. There is, as you have seen, an absolute power of contracting out of the Act with regard to the execution of improvements comprised in those two classes.

That is to say, the landlord and the tenant can arrange any terms they please as to the scale upon which compensation is to be assessed. But with regard to the nine kinds included in Class III. there is no such power. True, there is power for the landlord and tenant to agree as to the compensation; but unless the **compensation agreed upon is fair and reasonable**, the agreement is waste paper. To put it in another way, unless the landlord and tenant have come to an agreement giving the tenant reasonable compensation for improvements effected by him within Class III., the tenant has a legal right to the compensation provided by the Act. Moreover, the agreement to give this fair and reasonable compensation, to be valid, must be in writing. Nothing is said about it being signed, but a landlord or tenant would be exceptionally foolish if he did not obtain the signature of the other party or his agent. The agreement may be made by letter, and need not be a formal or "lawyery" document; but to be valid it must be "particular"—that is, not a general agreement. In other words, the agreement must relate particularly to the improvement for which compensation is claimed.

**How and when to claim compensation** for unexhausted improvements.—The first thing for the tenant to do is to give **notice in writing** (in England), two months at least before the tenancy comes to an end [four months in Scotland], to the landlord of his intention to claim compensation. He must be particularly careful to put down in his notice full details of his claim—what it is he claims for, specifying items and how much for each item.

In Scotland, owing to the wording of the Scottish Act, it is clear that if the tenant does not give his notice at least two months before the end of the tenancy, he can claim no compensation at all. That is, the landlord can treat any subsequent notice with contempt. In England the point is not quite so clear. The English Act says: "A tenant, claiming compensation under this Act, *shall*, two months at least before the determination of the tenancy, give notice." Now, does the word "shall" mean "must"? Is it imperative, or is it merely directory? If merely directory, then it may be that the persons assessing the compensation can take into account the fact that notice was not given in time, and may order the tenant to pay some costs for his omission; but the lateness of the notice will be no bar to the claim as a whole. On the other hand, if the word is imperative, omission to give notice in time is an absolute bar to the claim. I do not know of any decision either way, but in my opinion the word is here imperative, and if a tenant is late with his notice the landlord need not take the slightest heed of it. From the point of view of clearing up the law on the point, I should be glad if one of my readers would have the matter decided by the High Court. But unless he is a rich man, I advise him not to try it, but to give his notice in time, and so avoid any question.

The notice, as I said, is to be given two [in Scotland four] months **"before the determination of the tenancy."** Would you imagine that the words here printed in black type could bear more than one construction? They appear quite plain; yet so various are the circumstances of life that you hardly ever find an expression that is not capable of more than one



interpretation. The one quoted is no exception to the rule. Farmer Giles held a farm in Dorset as a yearly tenant from the 11th of October. It appears to be the custom in that part of the world for a farmer to hold over a portion of his farm after the notice to quit has expired, and not to give up that portion until four months after his tenancy is legally at an end. Farmer Giles had given notice to quit, his notice expiring on the 11th of October, 1888; but by virtue of the custom of the country he was entitled to remain in possession of 200 acres of meadow and certain other land until the following February. In November—that is, at least two months before the customary prolongation of part of the tenancy had expired, Giles sent in a notice for compensation for improvements under the Agricultural Holdings Acts. The landlord said, “You are out of time. Your tenancy determined in October.”

“Not so,” replied Giles. “By the custom of the country I had an extra four months before I need quit part of the holding; and I claim that my tenancy did not determine until the four months were up.” The issue was ultimately tried, and the judges upheld the contention of the farmer.

This decision cuts both ways. For instance, if a farmer goes bankrupt, his “trustee in bankruptcy” can disclaim the lease within three months of the date when the trustee was appointed. When the trustee does disclaim the lease, it means that he throws it up entirely; and the disclaimer operates to put an end entirely to the tenancy from the date of the disclaimer. Now, on the same principle as in the last case, the date of the disclaimer is the “determination of the tenancy”; and this makes it impossible for the trustee in bankruptcy (or the farmer) to get anything out of the landlord as compensation under the Agricultural Holdings Act. Why not? Because the trustee cannot give the notice of claim required by that Act, since the moment he intimates an intention to disclaim the tenancy comes to an end.

After notice by the tenant of an intention to claim compensation under the Act [this applies to both England and Scotland], **a counter-notice may be given by the landlord** any time before the determination of the tenancy or within fourteen days thereafter. In England his counter-notice can only claim from the tenant damages for waste—that is, for any deterioration in the property done or permitted by the tenant, and for any breach of covenant or agreement committed by the tenant. This section is senseless. In Scotland he can claim in his counter-notice “any compensation” due to him from the tenant under the Act. This provision for counter-notice is of no use to the landlord unless he counter-claims and has a good chance of getting allowed more than the tenant will get allowed on his claim. I will tell you why. It is because, in assessing compensation to the tenant, **deductions are to be made** on account of the following things:—

- (1) “Any benefit which the landlord has given or allowed the tenant in consideration of the tenant executing the improvement.”

This benefit is generally a deduction from the rent, but not necessarily. Thus, the landlord may have said, in answer to an application for time in which to pay rent, “I will give you six months in which to pay, if you will execute

such-and-such improvements." This would be a benefit. But, remember, no deduction is to be made unless the landlordly benefit was given *in consideration* of the improvement being executed. The mere fact of the landlord having given the tenant a benefit at some time or other, does not entitle him to any allowance on that account.

- (2) "In case of compensation for manures" you are to allow for "the value of the manure that would have been produced *by the consumption on the holding of any hay, straw, roots, or green crops* sold off or removed from the holding within the last two years of the tenancy, or other less time for which the tenancy has endured, except in so far as a proper return of manure to the holding has been made in respect of such produce so sold off or removed therefrom."

The Scottish Act does not specify any particular kinds of crops (see italics above), as in the English Act. Moreover, the Scottish Act only allows the landlord to claim the value of manure which would have been produced by the consumption, "according to the rules of good husbandry or according to the terms of any written contract specifying such rules," of crops on the holding. For my part, I am inclined to think that, despite the difference in form, the Scots and English laws are substantially all the same.

What is a **proper return** of manure to the holding? It means this, that when the valuer is assessing the compensation to be paid to you by the landlord for manure, he may take into account against you any crops sold by you, instead of consumed on the land, for the last two years; but he must take into account the manure value of any feeding-stuff brought on the land by you and consumed there in place of the crop sold off the land. Thus, last year you sold off the land ten tons of meadow-hay, instead of giving it to your own cattle to eat; but you bought last year six tons of clover-hay, which were consumed on the holding. You can set-off one against the other.

**How does the valuer set this off?** Does he say, "Sold ten tons of meadow-hay at so much; bought six tons of clover-hay at so much," and subtract one from the other? Not at all. He must say, "Sold ten tons of meadow-hay, *manure value* so-much; bought six tons of clover-hay, *manure value* so-much," and then subtract. And as the manure value of a ton of meadow-hay is about 30s. and of a ton of clover-hay about 48s., it will work out:—

					s.
Sold 10 tons meadow-hay, manure value ...	...	...	...	...	300
Bought 6 tons clover-hay, manure value ...	...	...	...	...	288
					<hr/>
Balance against tenant ..	..	..	...	...	12
					<hr/>

**Peculiar operation of the section in England.**—As was pointed out at the time the Agricultural Holdings Bill was before the House of Commons, the effect in England is to read into every agricultural tenancy an agreement to consume on the holding the hay, straw, roots, and green crops grown there. This obliges the tenant, instead of selling his hay, straw, roots, and other green crops, to import stock on his holding to eat them; unless, that is, he already has enough cattle and sheep of his own to do it. A farmer



must either do this or else be prepared to forego his claim under the Agricultural Holdings Act for compensation for manures. I therefore advise an English farmer who, during the last two years of tenancy has sold any considerable quantity of hay, straw, roots, or green crops off his holding, not to make any claim for manures, unless he has brought something equivalent to the hay, etc., to be consumed on the land.

An English farmer is only liable to cultivate his farm in a husbandlike manner, not to manure it this way and that. So long as he farms it according to the customs of the locality, he is all right.

Lastly, in assessing the tenant's compensation, the valuer must deduct:—

- (3) "Any rent due to the landlord. Compensation for waste or deterioration, committed or permitted by the tenant. Rates, taxes, or other public burdens, together with any other sum of money for which the landlord may become liable to a third person, but which the tenant has agreed to pay. Also, compensation for the breach of any stipulation in the lease, or of any agreement connected with the contract of tenancy."

With regard to the deduction for waste or deterioration, the landlord can only claim under this Act, in respect of waste, or deterioration, or breach of agreement which refers to a matter of cultivation or management, if the waste or deterioration has taken place **within the preceding four years.**

In England, instead of "cultivation or management," the word "husbandry" is used, but the effect is the same. Thus, when the tenant is claiming under the Acts for compensation for improvements, the valuer may take into account against him the fact that he, six years before, broke down one of the inside walls of the farmhouse. But they are not entitled to take into account the fact that five years before the end of the tenancy he sowed land with wheat when he ought to have let it lie fallow. If that breach of good husbandry occurred four years or less before the expiration of the tenancy, it can be set-off against part of the tenant's claim. This section does not take away the landlord's right to proceed in the Courts against a tenant who has broken the stipulations of his lease.

The **tenant's claim may be augmented** by adding any sum due to him for compensation in respect of any breach of a stipulation in the lease or any other agreement connected with the tenancy. From the form in which this is put in the Statutes, there appears to be no reason why the tenant should claim these damages for breach of agreement at the same time as he claims compensation for improvements. As I shall show you, claims for compensation for improvements must always be decided by reference to arbitrators or referees, but a tenant who has an additional claim for compensation for breach of agreement, and prefers to submit it to the decision of a court of law, is quite at liberty to do so.

Seeing that a tenant is entitled to compensation for manures, it is quite worth his while to ask: **What are manures** within the Act? The Act for Scotland does not define the term; but the English Statute confines it to (a) the application to land of purchased artificial or other purchased manure.

and (b) the consumption on the holding by cattle (including horses), sheep, or pigs, of cake or other feeding-stuff not produced on the holding. That is to say [in England], a tenant is entitled to no compensation whatever for manures produced by the consumption on the holding of stuff grown on the holding. I am not aware of any judicial interpretation of the Scottish Act as to what manures the tenant is entitled to claim for, but I believe the practice is only to claim for the same as the English Statute allows. And that this practice is good in law is apparent from two facts. It is reasonable. It is also consistent with the fact that the Scots as well as the English Statute gives compensation to the landlord when crops have not been consumed on the holding, except so far as they have been compensated for by the consumption on the holding of purchased products. (*See above*, p. 751.)

The **scale of compensation for manures** does not depend in any way upon the amount of money spent by the tenant upon the food brought on the land to be consumed by his cattle, sheep, or pigs, but upon what is called the residual manurial value of that food. It also depends upon how long ago the manure was applied to the holding. In almost every county and district there is now a Chamber of Agriculture which has drawn up a scale for use in their own district; and I should advise any of my readers who have any difficulty in assessing the amount of a claim under this head to write to the local Chamber of Agriculture, asking for this scale of allowances under the Agricultural Holdings Act.

It appears that there is a consensus of opinion as to the manurial value of certain artificial and other foods. The figures below are for one ton consumed :—

		<i>Value of residuum</i>		
		£	s.	d.
Decorticated cotton cake (about 6 per cent. nitrogen, 16 per cent. oil)	... ..	3	0	0
Linseed and rape cake ( $4\frac{1}{2}$ per cent. nitrogen, 11 per cent. oil)	... ..	2	10	0
Undecorticated cotton cake (3 per cent. nitrogen, 6 per cent. oil)	... ..	2	0	0
Beans, peas, tares, lentils, linseed, malt dust...	... ..	1	10	0
Wheat, oats, barley, bran, maize, malt	... ..	1	2	0
Hay and locust beans	... ..	0	16	0
Straw of beans, oats, wheat, barley, and peas	... ..	0	11	0
Potatoes	... ..	0	4	0
Mangel wurzel, carrots, and turnips	... ..	0	3	0

If the landlord and the tenant can agree upon the amount, and mode, and time of payment of the tenant's compensation under the Acts, they are quite at liberty to do so. But this rarely happens, and so there is provided by the Statute a **means of arriving at the compensation** to be paid. That means is by a **reference**. Here let me digress so far as to say that settlement of disputes by referring them to the decision of a neighbour, or of someone not a professional decider of disputes, was probably the origin of the judicial system. Imagine a primitive tribe or family. Two members go out hunting together. One of them sights a deer. They both stalk it, and the second one lets drive his club or his stone, wounding, but not disabling,



the animal. After a chase, the first savage brings down the prey and despatches it. Then they carry it home to feed their women and children. But when they come to divide the carcass, each of them is particularly anxious to have one tit-bit—the tongue, say. “I hit the beast first,” is the claim of savage number two. “But I first sighted him, and eventually brought him down,” is the reply of number one. And then, as they pass from words to blows, along comes an elder of the tribe, who steps between them, and demands to know the reason of this dispute. On being told, he says, “Will you agree to abide by my decision?” They do agree, and he decides, according to his notions, of the just and equitable. This is the first reference.

In the history of jurisprudence we soon find substituted for this voluntary reference to arbitration a compulsory reference. That is, either disputant can compel the other to go to one of the elders of the tribe, and have the dispute settled. This compulsory reference is enforced partly by the strong hand of the chief, and partly by the threat of supernatural penalties held out by the priests of the tribe. It is to the interest of the chief and the priests to have disputes settled by themselves, because it gives them power and influence, and it also yields them presents. Hence it speedily becomes the rule that there shall be special persons appointed to settle disputes—*i.e.* judges.

Down to the beginning of the Christian era we find traces of this influence in Roman law. When two Romans had a dispute about the ownership of a slave, or a beast, they appeared before the magistrate, bearing with them the thing about which they disputed. Then they each laid hold of the object of contention, and said, “I say that this is mine, by the law of the Romans.” Then the magistrate said, “Let it go, both of you; and you, Titus, tell me what this quarrel is about.” Then Titus stated his case, the other man replied, and the magistrate appointed a day for their cause to be heard by judges. Thus, you see, was kept up the fiction of two men quarrelling, and interference, in the interests of peace, by a passer-by—a far more picturesque way of beginning a lawsuit than our modern method, when the first intimation of unpleasantness is the appearance of a lawyer’s clerk with a dirty piece of paper.

Curiously enough, there has been a tendency in modern times in Great Britain for Parliament to compel the settlement of disputes by arbitration, rather than by process of law. Personally, I doubt the wisdom of the new departure. Make law cheap, if you like. But what folly to compel a man to have his rights determined by a person who may be totally ignorant of all rules of evidence, and who can hardly be so well able to weigh testimony as a man who is at it every day of his life. I am convinced that the solution of the difficulty will be found when somebody discovers a way to bring actions to a speedy trial. Mr. Justice Mathew devised a way in his Commercial Court. Speedy litigation means cheap law. It also means an absence of that worry and annoyance that are the chief dread of suitors.

To return to my muttuns. The only way of settling differences as to compensation under the Agricultural Holdings Acts is by reference. No action (diligence) can be used.

The matter is to be settled by **one referee, or two referees and an umpire** (called in Scotland an "oversman." When in this section I speak of an umpire, I include the Scottish "oversman," unless otherwise stated). If the landlord and tenant can agree on one referee, it is best for them to do so, as it saves time, trouble, and expense. If they cannot, then each of them shall appoint a referee. Suppose one party appoints his referee, and the other does not appoint one, the first party should give the second notice in writing, requiring him to appoint a referee. Seven days' notice is necessary in Scotland, fourteen days' in England. And suppose the landlord does not appoint a referee; then, after the notice is up, the tenant should, within fourteen days, make application to the County Court judge of the district [sheriff, in Scotland] to appoint a competent and trustworthy person to act for the landlord.

Having got your referees, the next thing is **to appoint the umpire**; and this can be done in one of three ways in England, and in one of two ways in Scotland. The usual plan is to leave the referees to appoint him; and this is done before they begin the reference, as a matter of course, unless either landlord or tenant takes the steps I am about to describe.

In England, either party may, when he appoints his referee, give notice to the other side, in writing, that the umpire shall be nominated by the Board of Agriculture. If you want the Board to appoint an umpire, you must apply in writing to the Secretary to the Board of Agriculture, Whitehall, London, S.W. Or either party, when he appoints his referee, may give notice in writing to the other that he requires the umpire to be appointed by the County Court of the district. It is then open to the other party to dissent, in writing, from this method of selecting an umpire, and if he dissents, application is to be made by either side to the Board of Agriculture.

In Scotland it is open to either party, when he appoints his referee, to give notice, in writing, that he wishes to have the umpire appointed by the Sheriff Court; and in that case, the sheriff, or sheriff-substitute, makes the appointment. There is no appointment by the Board of Agriculture in Scotland.

When neither party gives notice that he wishes the County or Sheriff Court or the Board of Agriculture to appoint the umpire, thus leaving the appointment in the hands of the referees, it may happen that the latter cannot agree on a man. To prevent a deadlock, one of the parties must give written notice to both referees, requiring them to make a selection; and if they do not within seven days nominate an umpire, application must be made to the County Court (England) or Sheriff's Court (Scotland), for the appointment of a competent and impartial person.

As to the kind of **person to be appointed referee or umpire**, let me refer you to my remarks on arbitrators (p. 387). You should not appoint anyone who has an interest either way, or who has already expressed an opinion. If you do, the whole reference may be quashed as being illegal from the outset.

The **duties and powers of the referee** begin as soon as his appointment is delivered to him. The appointment must be in writing, and having once made it, you cannot undo it, except by consent of the other party. Nor, without the like consent, can you appoint another arbitrator.



The reference ought not to proceed in the absence of either of the parties interested, unless this course seems expedient to the referees and umpires, and notice has been given to the parties to attend.

The referee, or referees, or umpire may call for any sample or document relating to the matter in question, and may take evidence of the parties and witnesses on oath or affirmation. It is perjury to give false testimony on oath at such a reference.

The referee or referees must have ready their **award in writing within twenty-eight days** after the appointment of the last referee who was appointed. When there are two referees, they may jointly, by a writing signed by them, extend the time for making their award; but they must not extend it so as to make the time for the award more than forty-nine days after the appointment of the last of them. Let me add that if the referees allow twenty-eight days to elapse without making an award, and without having extended the time, they cannot afterwards extend the time at all. Should the original twenty-eight days or extended time elapse without an award being made, the two referees have no more power; the umpire steps in. And the way the umpire steps in is by either party, or one of the referees informing him that the referees have failed to come to a decision. Then the umpire has twenty-eight days to deliver his award in writing. The twenty-eight days can be extended by the County Court judge (sheriff in Scotland) to not more than forty-nine.

The award is subject to **stamp duty**, varying with the amount in dispute. If the amount in dispute is £5 or less, the duty is 3d. From £5 to £10, 6d. Then it rises at the rate of 6d. for every £10, or fraction of £10, up to £50; over £50 and not more than £100, 5s.; over £100 to £200, 10s.; over £200 to £500, 15s.

In drawing up their award, the referees or umpire must be very careful to follow the directions of the statutes. It is **not enough to award a sum generally**. The award must specify in detail as far as possible

(a) The improvements, acts, and things in respect whereof compensation is awarded; and the several matters and things taken into account in reduction or augmentation of the compensation;

(b) The sum awarded for each item of improvement, reduction, or augmentation;

(c) The time at which each of the improvements was made, or at which any act or thing was done, committed, permitted, or omitted.

Referees cannot give a tenant more than he originally claimed.

**A landlord has the power to charge his estate** with the amount of compensation awarded to a tenant under the Act. He is personally bound to pay the tenant; but he may not be the absolute owner of the land. He may only have the life-rent or some other lesser interest. When he desires to charge the estate with the compensation, the referees must state in their award the time at which, for the purposes of such charge, each improvement is to be deemed to be exhausted. This is to put matters on a fair footing as between the landlord and his successors in the estate.

The **costs and expenses of the reference** are in the power of the person making the award, who may direct either party to pay the whole of them, or may order them to be borne by both parties in such proportions

as he thinks just. In awarding such expenses, the referees or umpire should have regard to all the circumstances of the case, and particularly to the reasonableness of the sums claimed by each party. Thus, if a tenant has claimed £200 for an improvement, and the referees decide that he is only entitled to £20, they may very well order him to pay all the costs of the reference.

The costs and expenses include the remuneration of the referees, and of the umpire, the fees and expenses of witnesses, solicitors, and counsel, a fee paid to an expert (such as an accountant) who has been called in by the referees or "oversman" to assist. These costs may be taxed, if either party desires it, by the Registrar of the County Court [auditor of Sheriff's Court, in Scotland].

The award must fix a **time for payment** of the compensation and costs. That time must not be less than a month after the delivery of the award. But it may happen that the party ordered to pay does not pay within the time fixed. What then? In England, the successful party must wait fourteen days after the time fixed in the award, and can then go to the County Court and get an order for payment. He then has the same remedies that a person has who has got judgment in his favour in the County Court in an ordinary case. In Scotland, the winner on the award must wait a month after the time fixed, and can then go to the Sheriff's Court and register the award in the books of that Court; after which, he may have execution against the other party.

The like law applies when the landlord and tenant have agreed upon the amount of compensation without submitting it to a reference.

As to the right to **appeal from the award**, it should first be observed that there is no appeal when the sum claimed (not awarded) does not exceed £100. But when more than that amount is in dispute, an appeal will lie on any one or more of these grounds:—

(1) That the award is invalid.

This would embrace such grounds as that referee or umpire had an interest or bias; that he refused to listen to proper evidence; that the reference was proceeded with without giving one of the parties notice to attend; and so on.

(2) That the referees or umpire improperly applied the sections of the Act relating to substituted compensation; that is, to compensation by agreement.

(3) That compensation has been awarded for something in respect of which the party claiming was not entitled under the Act.

(4) That compensation has not been awarded for something in respect of which the party claiming was entitled under the Act.

An appeal must be made within seven days after the award is delivered to the party who appeals, and if no appeal is made within that time the award is final.

In Scotland, the appeal is to the sheriff, and his decision is final. In England, you go to the County Court judge, whose decision is final, except he shall (*i.e.* must), if either party requests him to do so, state a case on a question of law, for the opinion of the High Court. From the High Court there is no appeal—that is, you cannot take a case to the Court of Appeal, or to the House of Lords.



The sheriff or County Court judge can either decide the matter himself, or send it back to the referees or umpire to be reconsidered by them. For example, if the umpire has assessed the compensation upon a totally wrong principle, applying the Act altogether wrongfully, the judge or sheriff will probably send it back to him, with a direction as to what the law is.

I only wish to add, that when the landlord desires to buy fixtures from the tenant (p. 744), and the question of price is referred to referees or an umpire, the award is final, and there is no appeal to the sheriff or County Court judge, no matter what the value of the fixtures may be.

The **amount of compensation**, both for improvements and for fixtures bought by the landlord, is the value of the improvements and fixtures to an incoming tenant. Most farmers and market-gardeners have a pretty good idea what this means; but for the benefit of those whose notions are hazy let me make the matter quite clear. The value to an incoming tenant does not mean the value to this or that incoming tenant. Clearly not, because there may be no incoming tenant at all; and, again, you may have used the farm as an ordinary arable farm for growing corn and so on, and with intent to make your place better, have improved it as for corn. Your successor may intend to lay it nearly all down to grass, so that for his purpose the improvements are almost worthless. Nevertheless, your landlord must pay you what that improvement would be worth to an incoming tenant who continued to run the holding on the old lines.

**When the incoming tenant pays the outgoing tenant**, as he very often does, a question arises when the incoming tenant goes out, "Has he any right to be repaid?" Yes, he has. If, with the landlord's *consent in writing*, an incoming tenant has paid the outgoing tenant the whole or part of his valuation for an improvement under the Agricultural Holdings Act, the incoming tenant stands in the outgoing tenant's shoes. How this works can best be shown by an illustration:—

Giles is going out of Manor Farm, and he has had awarded to him, under the Agricultural Holdings Act, amongst other improvements, £30 for fences put up by him, £100 for manures put down the year before, and £300 for laying down a permanent pasture. Mr. Cartale takes the farm, and with the landlord's written consent, pays half the sums above mentioned. Cartale remains tenant for five years, and leaves in 1898. He is entitled to claim from the landlord what those improvements are worth in 1898 when he leaves—not what he gave for them, because he has been having some benefit. Thus, the manure improvement is exhausted, but the fences and pasture still remain as permanent improvements. Cartale ought, then, to include in his claim, under the Act, a part of what he paid to Giles.

**Rights of sporting: Hares and rabbits.**—Unless the landlord reserves to himself the exclusive right to kill and take game, all the game found on a farm can be killed by the tenant and made his property. But, as a rule, the landlord reserves to himself all rights of sporting. In 1880 the Ground Game Act made a large encroachment on the rights of landlords in this respect. By that Statute, the right to kill and take ground game (hares and rabbits) was made inseparable from the occupation of land, and no contract or agreement can destroy the right. More than this, the tenant can authorise one person to kill ground game on his land

with firearms. Of course, if the landlord has not reserved the right to himself, this Act does not apply ; and the tenant can authorise any number of people to kill game. The person authorised under the Act must be authorised in writing ; and he may be (a) a member of the household resident on the land, (b) a person in ordinary employment on the land, or (c) a person *bonâ-fide* employed for reward to kill the hares and rabbits.

"DEAR MAC.—Can you come over and stay with me for a week? I can give you lots of rabbit-shooting. Kind regards to Mrs. Mac.—Your old friend, W. MURRAY."

Mac went over for a week to his friend Murray's farm, and had rare sport among the rabbits, though his joy was somewhat marred when he found that poor Murray was let in for a lawsuit on his account. For Murray's landlord had reserved to himself the exclusive right of shooting game on the farm, so that the tenant had only the rights allowed by the Ground Game Act, namely, for himself and one person by him authorised. Said the tenant, "I authorised my friend." "I daresay you did," replied the landlord, "but you had no right to. Mr. Mac was not a 'member of your household resident on the land.' He was not in your ordinary employ, nor was he specially hired by you to shoot the rabbits." This put the tenant into a slightly feverish state, but he consulted his man of law. Said the man of law, "You had a **right to invite a friend for a week's shooting**. So long as he was your guest he was a member of your household." Fortified by this sage advice, the sturdy farmer told his landlord to do his worst ; and presently the case came before their lordships at Edinburgh. The Court of Session had no difficulty in deciding against the landlord and in favour of the farmer. What a blessing to the numbers of men who know hospitable farmers and who delight in standing at the safe end of a gun!

A **gun-licence but no game-licence** is required by the tenant and the one authorised person. A gun licence costs 10s. and a game licence £3. Although the tenant farmer (or market-gardener) has the right to kill ground game, his right is not quite unbounded. He must not, for example, shoot hares and rabbits at **night time**—from the end of the first hour after sunset to the beginning of the last hour before sunrise. He must not employ **poison**. And he must not set **spring-traps** for them, except in rabbit-holes. A rabbit-hole means a hole—not what is called the scrape or run—but the part underground. The reasons for these precautions are obvious. Poison is just as likely to be eaten by pheasants and partridges as by hares and rabbits. You may set a spring-trap for a rabbit and catch a grouse. And a man going out at midnight to shoot hares might easily knock over a few blackcock, or even a keeper. A tenant doing any of the three things that I have warned him not to do, may incur a fine of £2.

Rabbits and other wild animals killed on your farm are yours, and you can bring an action against anyone who takes them away. I am not going to enter into the question of poaching, further than to say that by an old Act of Parliament any landowner, or person having a right of shooting, or the servant of either, can arrest anybody found trespassing in pursuit of game or rabbits in the daytime, if that person refuses, on demand, to give his name and address. Night poachers cannot be arrested by persons who merely have shooting rights and are neither owners nor occupiers of the land.



**Hedges, ditches, and fences** are great bones of contention between neighbouring farmers. "Your cattle have been in my field, Mr. Jones, and they have trampled down the young corn." "I am sorry, Mr. Smith, but it is your fence, and if you do not choose to keep it in repair, you must expect cattle to come through the gaps." This is a kind of discussion that often takes place. What are the rights of the neighbours?

Assuming that the fence was Smith's, it is, of course, his duty to repair it—or, rather, it cannot be Jones's duty to keep another man's fences in order. But it is not Smith's duty to fence against Jones's cattle. It is not his business to keep Jones's cattle from trespassing. That is Jones's business. All that Smith has to do is to fence his own cattle in. So that if your neighbour's cattle stray into your field through a hole in the hedge that you have carelessly left, you can still claim damages for the trespass; and your neighbour cannot run away on the plea that you ought to have mended your hedge, and then the mishap would not have occurred.

But **whose hedge was it?** This is not always an easy question to answer. It depends on the answer to another question: "Upon whose soil was the hedge built?" You very often see a hedge and a ditch, and in that case the presumption is that the hedge is inside the ditch, not outside. In other words, the presumption is that the owner of the field cut a ditch on the very outermost edge of his property, and then planted the hedge inside it—on his own side of the ditch, I mean. This presumption is not absolutely conclusive. That is to say, the other farmer may prove, if he is able, that the hedge and ditch are his. It merely amounts to this, that in the absence of evidence to the contrary, the hedge will be presumed to belong to the man on the same side of the ditch.

But how does it stand when you have a hedge with a ditch on each side of it? Well, there is nothing to guide you, and the question becomes one of evidence. Someone surely mended the hedge at some time or other, and that someone was probably the person bound to keep it in repair—*i.e.* the owner. And, again, there is no legal presumption to guide you when there is a hedge and no ditch; but the question is purely one of evidence.

**Rates.**—Under various Acts of Parliament, rates on agricultural land have been made less than the rates on houses, buildings, and property other than land. The principle of the exemption seems to be that land is, as it were, the stock-in-trade of a farmer, a nurseryman, and a market-gardener; and a farmer who occupies land of the annual value (p. 223) of £250 a year is probably no better off, and therefore no better able to pay high rates, than his neighbour the butcher, whose rent is only £50. Therefore a person occupying land used as arable, meadow, or pasture-ground only, or as orchards, or an allotment, is only liable to be assessed to the "general district rate" in the proportion of one-fourth of the annual value of the land. The same applies to the public library rate; but there the rateable assessment is two-thirds of the annual value, and the lighting rate is one-third.

By the Agricultural Rates Act, 1896, for the first time, **general relief is given to the agricultural community out of Imperial funds.** This Act

applies only to England. With regard to the "general district" and public library rates, the Act makes no difference; because there the distressed agriculturist is already exempted from paying half rates or more; but in all cases where, by existing law, the occupier of a farm, or market-garden, or nursery-ground is liable to pay rates at more than half of the annual value of the land, the occupier is to be relieved of the payment of half his rates. The parish does not lose, however, because the other half is paid by the Government. The exception to the Act is the sewers rate. Government pays none of that; nor does it bear any part of a rate which is raised for any drainage, wall, embankment, or other work for the benefit of the land.

The relief is not to be granted for lands occupied together with a house as a park; not for gardens, except market-gardens, nursery-grounds, and cottage-gardens exceeding a quarter of an acre; nor for pleasure grounds; nor for land used mainly or exclusively for sporting purposes; nor for a race-course.

The main question that seems to have arisen on the Act is the great "glass-house" question. It was held under another Act of Parliament that the glass-houses of a market-gardener or nurseryman were land—not buildings. Now the 1896 Act relieves land, but does not assist buildings. And the Revenue authorities who were employed to protect the public purse in this matter, contended that under this Act glass-houses were buildings, and that therefore land covered with glass-houses was to be considered fully rateable as before, and could not claim the benefit of the Government dole. I have it on excellent authority that the rating assessment committees up and down the country took, as a rule, the view that glass-houses were within the Statute—that is, they were "land," not "buildings"—and were consequently entitled to pay only half rates, the other half being paid by Government. Several cases were tried by the quarter sessions, and in nearly every case, I believe, the occupiers of land covered by glass-houses were adjudged entitled to the exemption.

The Act is stated to be only temporary. It is to run for five years from the 31st of March, 1897; but 'tis easier to give than to take away, and we may look for a continuance of the measure.

In Scotland there is a similar Act. For the purposes of agricultural law and heritages the occupiers' consolidated rate leviable by County Councils (including the portion levied under the Public Health Act) is to be levied on the nearest aggregate sum of pounds sterling to three-eighths of the annual value of the land. For purposes of poor-rate, school-rate, and the parish council rate, three-eighths again is to be paid on by the occupier; but the occupier is also allowed the former deductions under the Poor Law Act. The practical result to the farmer and market-gardener is, that they get off by paying three-eighths of their old rates.



## CHAPTER X.

### THE LAW OF THE WORKMAN.

*Section i.*—TRADE UNIONS: STRIKES.

*Section ii.*—FRIENDLY SOCIETIES: COLLECTING SOCIETIES.

*Section iii.*—WAGES: TRUCK ACTS; PIECE-WORK; BREACH OF CONTRACT

*Section iv.*—APPRENTICES.

*Section v.*—COMPENSATION FOR ACCIDENTS: EMPLOYERS' LIABILITY.

### SECTION I.

#### TRADE UNIONS.

History of trade unions—The ancient guilds—Modern unionism—Trade unions formerly illegal—Masters' associations on same footing—Trade Union Act, 1871—Registration—The rules—How to register—No two unions of same name—Changes of rule—Internal affairs—Property belonging to union—Transfer to new trustees—Land, how transferred—Officers—Trustees—Their duties—To look after the money—Auditing—The evils of an ignorant auditor—Trustees entitled to be recouped—Duties and liabilities of officers—Fraud of officers—A fund must not be diverted from its original purpose—The treasurer—His duties—Annual government returns—No income tax on provident fund—Disabilities of unions—Cannot enforce contracts with members—Or with other unions—STRIKES—Formerly criminal conspiracies—But not always now—A strike not criminal unless accompanied by violence—"Picketing" legal if peaceable and persuasive only—Use no violence or intimidation—"Intimidation": what it is—criminal to "follow about persistently"—To "create a disorderly crowd"—To injure property—To hide tools or clothes—Strikes may still in exceptional cases be criminal—Gasmen—Waterworks men—Danger to human life—Injury to valuable property—Unionists and non-unionists—Is it an actionable wrong to persuade a master to dismiss a non-unionist?—Or not to engage one?

TRADE UNIONISM in Great Britain is very old—almost as old as trade, in fact. From time so old that record does not run to the contrary, workers have found it to their advantage to combine—not necessarily as against employers, but as against the exactions of kings and governors, and also by way of reaping the advantages now offered by Friendly Societies. The associations to which I refer were called Craft Guilds. The word *guild* comes from the old Saxon word *gilden*, meaning to contribute. Besides the craft guilds there were religious guilds, the members of which bound themselves to contribute towards the expenses of various religious ordinances and observances, amongst which was burying deceased members and paying for masses for the repose of their souls. This kind of guild was probably the earliest, being known amongst the Anglo-Saxons of England and the Scottish Lowlands before their

conversion to Christianity. Then there were Frith Guilds, whose members were bound to protect or avenge one another. These also were of very early origin, and were encouraged by the laws of the great Alfred. More important, perhaps, were the merchant guilds, whose object was to regulate trade and procure special privileges for the members. I believe that one merchant guild still exists in England, namely, in the proud town of Preston.

It is, however, with the craft guilds that we are chiefly concerned. In almost every town, both in England and Scotland, wherever there was any considerable number of craftsmen following a special trade, they formed themselves into a guild. There does not appear to have been any one of these associations which extended its operations beyond the boundaries of one town; there was no such thing as national trade-unionism dreamt of at that time. The craft guild always aimed at monopoly. It discouraged the presence in the town of any craftsmen who did not belong to the guild. The discouragement usually took the form of a very severe and active boycott. The "alien," as he was termed, was shunned in the street, the market, the church. The baker durst not sell him bread, for fear of losing the custom of the guild brethren. No one would work for him, from dread of the censure of the craft; unless, indeed, it was some other miserable stranger. Some guilds held charters from the king, giving them the right to prosecute such strange craftsmen even to fine, imprisonment, and expulsion from the gates of the city. Each member of the craft of tailors in the city of London, when he was admitted a member of the guild, took oath on the four Gospels to search for and denounce to the magistracy any tailor not being a member of the guild found working in the city. The Lord Mayor and aldermen had power to make short work of the offender.

It may be thought that monopolies of this kind could hardly be good for the public. A close ring is all very well if you happen to be on the right side of it—that is, the inside. But these associations had great compensating advantages from a public point of view. If you bought armour made by one of the guild of armourers, you could be fairly certain that it was the best work obtainable of its kind. For one thing, the workmen were all skilled hands—they did not put on one man to work at another man's job. Any guild-brother guilty of such unworthy conduct would have been summoned before the elders of his guild and reprimanded, fined, or even expelled. Moreover, every workman was obliged to serve an apprenticeship of not less than seven years to a master craftsman; and in those days, an apprentice who did not use his best endeavours would taste of the rod or the tawse. Besides this, even after an apprentice had served his time, he was not admitted a member of the guild unless the said elders adjudged him to be a competent workman. Pursuing the same standard of excellence, the rules of the guilds contained many provisions against "false work." No sham or shoddy for them! No jerry-built houses were erected by the brethren of the craft of bricklayers; for these men, no less than their master, dared not use mortar compounded of earth and water, nor insert half bricks where whole bricks ought to be. Of the excellency of their work I had ocular demonstration not long ago, when



I saw labourers trying to chip off a piece of a wall erected in the fifteenth century. One of the men assured me, that it took at least six times as long to do the job as it would have done had the wall been built within the last two hundred years.

Down to the middle of the sixteenth century the craft guilds flourished in great and still greater power and glory. They almost completely absorbed the merchant guilds, and in many places acquired the sole right of managing the affairs of the town. Particularly was this so in London, where the guilds, which were there known as companies, obtained absolute control over the affairs of the city. Towards the latter half of the sixteenth century, craft guilds began to lose control over the trades whose interests they were formed to promote; and at the end of another hundred years that influence had almost entirely disappeared. They did not move with the times, and the times could not afford to wait for them.

The death-blow came, when in the reign of Queen Bess the Law Courts heard the trial of the action of Davenant against Hurdis. Edward Davenant was a member of the guild or company of Merchant Tailors who had his business and dwelling-house in Bread Street, in the City of London, hard by the present site of the General Post Office. At that time the Merchant Tailors' Company claimed under an old charter of Edward I. to have control over not only the making of clothes, but also over the manufacture of cloth in London town. And, in fact, they had controlled these industries for three hundred years or more. One of their rules was that "Every brother of the fraternity who should put forth to be dressed, rowed and shorne any broadcloth, frize, or cotton to any person using the trade of cloth-working and not being a freeman of the Company of Merchant Tailors," should be liable to a penalty. The penalty was the forfeiture of one-half of the cloth to the use of the poor brethren of the company, and ten shillings fine for each piece put out to be "dressed, rowed and shorne." And the company were empowered to enforce the penalty by distraint; that is, by entering the culprit's house and seizing and selling his goods.

Contrary to this rule, Edward Davenant of Bread Street put out twenty pieces of broadcloth to be rowed, dressed and shorne to Walter Price, a Welshman, who had the misfortune not to be a member of the Merchant Tailors. Price seems to have done a good business, for he employed as many as twenty workmen, none of whom were Merchant Tailors. When the company heard of Davenant's heinous conduct, they sent their officer, one Hurdis, who broke into Davenant's house and took away the "twenty pieces of broadcloth of watchett colour," value £20. For this trespass and spoliation Davenant put Hurdis in the court, claiming compensation. Hurdis's defence was that he had acted lawfully under the rule quoted above. Davenant replied that the rule itself was unlawful, because it amounted to a claim of monopoly in the London cloth trade. The judges decided that the Merchant Tailors' Company virtually claimed a monopoly, and that therefore their rule was illegal.

It is interesting to note that about this time (1599) the House of Commons waged a successful war against the granting of monopolies by the sovereign.

On their remonstrance Elizabeth promised to grant no more of these unpopular favours. James I. (of England—VI. of Scotland), when he succeeded to the English crown, revived the system, and found it a cheap and easy way to gratify and enrich his favourites by giving them monopolies in various commodities. The evil waxed so great, that at last a statute was passed in 1615 confining these royal favours to new and useful inventions for a period of fourteen years. Since this Act, the monopolies of inventions have been called "Patents."

**Modern trade unions** are not above a hundred years or so old. They practically date from the general introduction of machinery. The ancient craftsman stood in vastly different relations to his employer from the relations between the nineteenth century workman and his master. The old employer was invariably a master craftsman, who had served his apprenticeship to the trade, and was a member of the same guild as his men. Besides, the men, as a rule, lived with or near the master. Fewer men were employed in the same workshop, so that the master knew them all. They were not, as in these days, simply so many "hands." This fact explains a good deal in the law of master and servant.

The introduction of machinery, the spread of trade and commerce, and the rearing of the huge modern factories, with the consequent employment of vast numbers of people by the same man, account, I think, for trade unionism as we now know it. The modern trade union is an association of persons employed in the same trade for regulating the relations between workmen and masters. It may also have as objects the benefit of members of the union by supporting them while they are out of work, allowing sick and funeral benefit, replacing tools lost or stolen, and by other means of a like kind.

**Trade unions formerly illegal.**—Now, by the Common Law of England, an association or combination of persons by which they fetter their individual right of working is illegal. By illegal, I do not mean that anyone joining such an association would be liable to punishment; but illegal to this extent, that its rules and regulations are absolutely void and of no effect; it can hold no property, still less can it enforce against its members the rules of the association or the decision of a majority of the members. The same principle applied to associations of employers banded together to establish a common rate of wages and to take concerted action in case of trouble with their work-people. It is the same principle that I have noticed in dealing with the Law of Contract generally (Book III., chap. 1), when I show that even if I sell you my business and goodwill, and agree not to carry on the same trade, the latter agreement is void if it is more than is reasonably necessary to disable me from competing with the old business. The reason is that the law looks with disfavour upon any restraints on lawful trading (*see* pp. 314-9). In old days no agreement whatever in restraint of trade was allowed in England. The other day I came across a curious old case indicative of the way in which the Bench regarded such agreements. It was in 1414, and the defendant had agreed not to exercise the trade of a dyer in a certain town for half a year. Mr. Justice Hull remarked that the agreement was void, and, he went



on to say, "*Per Dieu, si le plaintiff fiut icy, il ura al prison tang' il ust fait fine au Roy:*" which being translated from the Norman-French of the old report means, "By God, if the plaintiff were here, he should go to prison until he had paid a fine to the king."

This habit of cursing from the judicial bench continued as late as Lord Thurlow, who flourished on the woolsack in the reign of Farmer George. The Lord Chancellor (keeper of the king's conscience, by the by) had a pleasant way of swearing at the barristers who practised before him, not to speak of solicitors and minor persons. It is related that one Christmas time he rose for the vacation and retired from his seat without wishing the Bar "*A Merry Christmas and Happy New Year,*" as had been his wont. In fact, he said never a word; which caused a ribald member of the profession to observe, "*Very discourteous of him! He might at least have said, 'Damn you!'*" But the judges are more polished in their language since the advent of the shorthand reporter.

To come to more modern times, the first case in which trade unions were held to be illegal associations was, curiously enough, not a case of a men's union, but a masters' association. In the year 1854, the mill-hands of Lancashire were even then united in a strong and effective trade union; so strong, indeed, that they generally proved more than a match for any master who fell foul of them. Perceiving that union was strength, the mill-owners of Wigan and district formed themselves, to the number of eighteen, into a masters' association. The objects of the association were stated to be "*to vindicate the masters' legal rights to the control and management of their property, which would also best sustain the rights of the labourer to the free disposal of his skill and industry.*" What tender solicitude for the rights of the poor labourer!

To these ends—most laudable ends, be it said—the eighteen mill-owners agreed by a bond to abide by and act up to the decision of the majority of the association as to the amount of wages, the periods of work, and the general management of their establishments; and each one agreed to forfeit £500 if he broke his engagement. One mill-owner, Eckersley by name, did break his engagement, and was brought to book in a court of law for the £500. But the bond was held to be null and void, and of no effect. It was, said the judges, in restraint of trade. Baron Alderson delivered the judgment of himself and his brethren, and said, "*First, each of them is prevented from paying any wages, except such as the majority may fix, whatever may be the circumstances of the work to be done, and his own opinion thereon. . . . All these are surely regulations restraining each man's power of carrying on his trade according to his discretion, for his own best advantage, and are therefore restraints on trade not capable of being legally enforced.*"

It was not a long jump to apply these principles to a men's union; for clearly if it was illegal for a number of masters to agree to employ their men in accordance with the view of the majority of masters, it was equally illegal for a number of men to band together and say, "*We will not accept employment except on the terms approved of by the majority*" The restriction

on individual liberty was the same in the one case as in the other; and this restriction was repugnant to the law. The right was tested in two cases decided in the years 1867 and 1869. In the first case (1867) a trade union was formed under the usual kind of rules—partly for the relief and assistance of sick and unemployed members, and partly for the purpose of enforcing the rights of the men against the masters. The secretary of the union applied to have the union registered as a Friendly Society—for various reasons explained hereafter. Mr. Close, the Registrar of Friendly Societies, refused to register the union, on the ground that it was an illegal association, and therefore could not be recognised. The union appealed to the Courts, but the Courts upheld the registrar. Chief Justice Cockburn said, “As trade unions, so far as they have come under my notice, have rules and regulations that operate in restraint of trade . . . they are illegal.” In the second case (1869) the Amalgamated Society of Carpenters and Joiners drew up a set of rules in which all reference to strikes, combination against masters, and so on, was carefully left out. But the rules gave power to the society to give relief to members out of work for any cause satisfactory to the executive council. Mr. Close, the Registrar of Friendly Societies, refused to register this society also, on the ground that one of its real objects was to support members on strike and to call the men out if necessary. Again the Court upheld him.

The result of these cases was the **Trade Union Act, 1871**, which for the first time legalised a combination of men, one of whose objects was to “restrain trade”—that is, to bring pressure to bear on employers to raise wages and give better terms of employment by means of combined Action. The 3rd Section says: “The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void any agreement or trust.” Then the statute proceeds to make it lawful for trade unions to hold land and buildings, to have trustees to hold property for them, and to be registered as corporate or semi-corporate bodies.

The **effect of the Act** was very beneficial to the unions—as will be best seen by comparing the position before and after 1871. Before that year, seeing that a trade union was illegal for all purposes whatever, it was illegal for trustees to hold property in trust for such a union. If an official embezzled the union funds it was extremely difficult to bring him to book. The union could not enforce any contract in the courts of law; and, in fact, unless everyone connected and having dealings with the society were perfectly honest and upright, it was a matter of the greatest difficulty to carry on the union at all. But the Trade Union Act, 1871, gave the union a legal status, and removed all these difficulties. It gave security to its property; insured that its funds should be properly applied for the objects of the society and for no other purpose; provided for proper management of its affairs; and enabled the society to prosecute dishonest officials.

The first thing to be noted as being provided for by the Act is **Registration**. I should never advise anyone to join an unregistered trade union. If any of my readers belong to such a society they should at once try to persuade their fellow members to have it registered; for it is only a registered trade union



which is recognised as valid by law. Before you can register the union you must draw up the rules for its government; for it is the registration of these rules which constitutes registration of the union. What these rules are must depend on the particular objects of the society; and it is desirable to have legal advice in drawing them up. If such advice cannot be obtained, you should procure a copy of the rules of some other registered union, and draw yours up from it—using it as a model, that is.

Now, there are certain **things which the rules must provide for** in order to comply with the law. They are:—

(1) The name of place where meetings for business are to be held, and where the business of the union is to be carried on.

(2) The objects of the union. And as in the case of a limited company, which is bound by its memorandum of association (p. 607), so the union is not allowed to spend any money on any object not specified in the rules. Every purpose for which funds may be spent must be put down in black and white; and should the executive attempt to spend any money for other purposes, any member may have them restrained by a court of law.

(3) The conditions (all of them) under which any member may become entitled to benefit; and the fines and forfeitures that may be imposed.

(4) The manner of making rules, or altering, amending, or rescinding them. I advise that the power of altering rules or making new ones shall not be put in the hands of a bare majority; or that some device shall be adopted to prevent frequent and frivolous alteration of rules by a snatch vote. One well-known society (Amalgamated Carpenters and Joiners) provides for alteration of rules by a bare majority of members present at special district meetings; but no alteration of rules can be proposed unless it has received the sanction of the general council of the union. This is a wise precaution.

(5) A provision for appointing and removing a committee of management, a trustee or trustees, a treasurer or treasurers, and other officers.

(6) A provision that the funds shall be invested, how they shall be invested, and for an annual [or oftener than annual] audit of accounts.

(7) A rule for allowing all persons interested in the funds of the union to inspect the books and list of members.

It must strike anyone how curiously these rules are like those appointed for the protection of shareholders in limited companies.

Having drawn up your rules, you must have a copy made and **signed by seven members** before you can register. There seems to be some Parliamentary virtue in the number seven for purposes of forming associations. For instance, seven persons must subscribe the memorandum of a limited company before it can be registered. Again, no Friendly Society can be registered unless it consists of at least seven members. Why seven? Is the number so fixed because of its historical associations—to wit, the seven wise men of Gotham?

**How to register.** The country of the union's place of meeting (*see* suggestions for rules, above) is the country where it must be registered; and the place of registration is the Office of the Registrar of Friendly Societies in London, Edinburgh, or Dublin. Mind, although the Registrar of Friendly

Societies is also Registrar of Trade Unions, there is a great deal of difference between a friendly society and a trade union; and if you try to register a union as a society, you will be unable to do so. Even should you succeed by some chance in getting registered as a friendly society, the registration will be of no legal value.

Send to the Registrar an application for registry. This application ought to be made on a printed form, of which a copy will be supplied by the Registrar if you write to him and ask him for one. The form is very easy to fill in, and must be signed by seven members duly authorised by the union to apply for registry. Send along with the application two printed copies of the rules; a list of the titles and names of officers; and a general statement of the affairs of the union, if the latter is a going concern. Of course, if it is an entirely new concern, there can be no such statement.

I would have you observe that the Registrar is not allowed to register a union bearing a name so similar to that of another union as to be liable to cause confusion. A somewhat amusing instance of this occurred in the case of the Amalgamated Society of Carpenters and Joiners. This was an unregistered body which had dissension in its ranks, winding up in a split. Each section claimed to be the only true, original, and orthodox Amalgamated Society of Carpenters and Joiners. Which was quite right according to the witty bishop's definition. "Orthodoxy," said he, "is my doxy. Heterodoxy is your doxy." Now, when the union split, each section called itself "The Amalgamated Society of Carpenters and Joiners"; and, in order to obtain the exclusive right to that style of title, simultaneously attempted to register under that name at the Registry of Trade Unions. The Registrar, not being able to decide which was the real Simon Pure, refused both the applications. An attempt was made to compel the official to register one of the sections; but the Court held that he was justified in refusing to accede to the application of either party.

Pray do not suppose that the Registrar has a discretion as to what trade union he shall register or refuse to register. The Act says that upon the regulations being complied with, he "*shall* register such trade union and such rules."

Upon registering the union the Registrar must issue a certificate of registry; and this is a very important document. For a trade union has no legal standing in any Court unless it is registered; and the certificate is proof in itself that all the formalities of registration have been complied with. So that in any legal proceedings—for instance, in prosecuting a dishonest officer for embezzlement of funds—the secretary or whoever is prosecuting on behalf of the union ought to have the certificate in Court as proof of the society's legal existence. A fee of £1 has to be paid to the Registrar when he issues the certificate.

**Registered office.**—As in the case of a limited company, a trade union is bound to have a registered office, to which all communications may be addressed. It is illegal for a registered trade union to be in operation for seven days without having such an office; and the union and each officer thereof is liable to a



penalty of £5 a day while there is no registered office. The address must be sent to the Registrar; and every change of address must also be notified to him under the penalty just mentioned.

**Change of rules** must also be notified to the Registrar before the 1st of June in each year, and also changes of officers. A copy of the rules as they exist at that date must also be sent to the Registrar annually, along with the general statement of accounts (*see* p. 774). The penalty on the union and every officer thereof failing to observe these regulations is £5 for each offence. There is also a penalty of £50 upon every person who wilfully makes, or orders to be made, a false entry in, or omission from, the copies of rules, or alterations of rules.

#### INTERNAL AFFAIRS OF A TRADE UNION.

**The property of the union** is to be vested in the trustees appointed by the union. It sometimes happens that a branch has property of its own, and in that case the branch's property may either be vested in separate trustees of the branch, or in the trustees of the union, if the rules of the union so provide. When I say that the property is to be "vested in" trustees, I mean that the trustees are to be treated in law as being the owners of the property. It is invested in their names. If any action at law is necessary to protect the property, that action must be brought in the name of the trustees. If the union leases an office, the lease must be to the trustees. It cannot be to the union as such; because a trade union is not a recognised legal entity or person.

In one respect, trade unions are highly favoured; and that is in this respect. If Jones and Smith hold property as trustees for me, and Jones retires from the trust and Brown is appointed in his place, in order to transfer the property to Smith and Brown instead of Jones and Smith it is necessary, as a rule, to have a deed, or else apply to the Court. I need hardly say, perhaps, that either of these courses involves expense as well as trouble. Now, in the case of trade unions, whenever a **new trustee** is appointed in place of an old one, or in addition to the old ones, the property of the union vests in the new trustee merely by the fact of his appointment—automatically, that is, without the necessity for any formal conveyance or assignment. To this rule there is one exception, namely, in the case of funds invested in public stocks and securities. You know, doubtless, that when you purchase (say) £100 worth of Consols, or any other Government security, your name must be registered in the books of the Bank of England or the Bank of Ireland. A trade union's money so invested will stand in the joint names of the trustees; and when new trustees are appointed the stock has to be re-registered in the names of the new trustees.

This is how to do it:—Thomas, Williams, and Jeans are trustees of the Handkerchief Stitchers' Trade Union, and they have standing in their name in the books of the Bank of England £5,000 Consols, the property of the Union. Thomas becomes bankrupt, or is absent from the country (*e.g.* emigrates to America), or files a petition, or executes a deed for the liquidation of his affairs, or becomes a lunatic, or is dead, or the Union has removed him from his office of trustee (which must be done strictly according to rule), or he has

been lost sight of, and the Union does not know whether he be living or dead. In any of these events, the Union ought to appoint a new trustee in his place; and we will suppose they appoint Stevens. As you see, it is necessary to get the £5,000 Consols out of the names of Thomas, Williams, and Jeans, and to get the stock put into the names of Stevens, Williams, and Jeans. A letter must be written to the Registrar of Trade Unions, signed by the secretary and three members, informing him that Thomas, one of the trustees, has become bankrupt, or lunatic, or has died, etc.; and also informing him that Stevens [*full name and address*] has been appointed trustee in his place. You must also inform the Registrar of the fact of the Consols standing in the names of the old trustees, and request from him a direction that the stock be transferred to the new ones. The Registrar will then direct the two remaining trustees (Williams and Jeans) to transfer it from the present names to those of themselves and Stevens. If Williams and Jeans refuse to do this, or are unable to do it, the Registrar may direct it to be done by the proper official of the Bank of England. Suppose all three of the old trustees are dead, or lunatic, etc., and you elect three new ones, the Registrar will at once direct the official at the Bank to transfer the stock into the names of the new trustees. As I have already said, the other property of the Union goes to the new trustees without any formal transfer.

**Land or buildings** may be bought or hired in the name of the trustees for the union; but such land must not exceed one acre in extent. The trustees for the time being have power to sell, exchange, mortgage, or let such land or buildings. For this purpose every branch of a trade union is considered a distinct union; otherwise it would be impossible for a trade union with many branches to have an office for each branch. The law therefore allows land not exceeding one acre to be held in trust for every branch.

**Trustees.**—It is most important for the interests of a trade union that men of strict honour and integrity, and of good business habits, should be appointed trustees. It is also desirable that they should be men of some substance, if such men are to be found willing to undertake the duties. In many unions every branch has its own trustees, a course which has its conveniences, especially when the branches are scattered up and down the length and breadth of the country. But when the union is local in its operations it is better to have one set of trustees to act for all the branches as well as for the union as a whole. The law requires that the treasurer or other officer of a union shall render an account of the funds whenever the rules of the society require it. In addition, **the trustees have the right to call for an account of all moneys** received and paid by any officer since the time when he rendered his last account. It is the duty of the trustees to cause this account to be audited by some proper person. The trustees should take care that they nominate the auditor in such a case, and not allow the treasurer or secretary to nominate him.

**Bad auditing** is at the root of very many of the evils that trade unions, building societies, friendly societies, and such-like bodies are heir to. It is a not uncommon practice for trustees of trade unions to cause the treasurer's



accounts to be audited by one or two people whose only recommendations are transparent honesty, a touching belief in the honesty of everybody else—especially of the treasurer whose accounts they are auditing—and sublime ignorance of figures and book-keeping. If I were a trustee of a trade union I should deem it my duty from time to time to call on the treasurer to render an account; and to have that account gone into by a professional accountant.

Having got their account properly audited, the trustees will know how much is due from the treasurer to the society; and he must then straightway hand over that balance to the trustees. At the same time the trustees may require him to hand over to them everything belonging to the union that he happens to have in his possession. If he refuses or delays to do so, the trustees may without more ado take legal proceedings against him to recover the balance and the property.

**Legal proceedings by or against the union,** in respect of the union's property, are to be brought by or against the trustees for the time being; and when any one of the trustees dies or is removed from or vacates his office and another is appointed, the new one succeeds to the action in place of the old one, and is liable to pay or entitled to receive damages and compensation, costs and expenses from the other side, as though the action had originally been begun in his name. I need hardly say, perhaps, that if the trustees lose any action concerning the trade union's property and have to pay damages and costs or expenses, the union must recoup them. In fact, in all cases **the trustees are entitled to be recouped** any expense to which they have been put on the union's account, and may sell any property to repay themselves. But they are not entitled to charge anything for their trouble, unless the rules of the society allow it.

**Limitation of trustee's responsibility.**—Every trustee of a trade union is liable to account for and make good any money received by him on account of the society. But he is only liable for what he himself has actually received, and is not liable to make good any deficiency in the funds other than what he himself has caused by his dishonesty or gross carelessness. In no case is he responsible for the neglect or fraud of a co-trustee.

**Statutory duties and liabilities of officers.**—Besides being liable to account to the trustees (*see* p. 771), the treasurer and officers are liable to render to the members a just and true account of all moneys received and paid by them since the last statement. This account must be rendered at a meeting of the union (or branch, as the case may be), and must be rendered as often as the rules require.

Another duty is for the officers to deliver up the books of account, money, and other property belonging to the union when required so to do. For instance, suppose the committee have power to dismiss the secretary, and they dismiss him and appoint another, the old secretary must hand over all books, papers, money and property to the new man. If he refuses to do this, he can be prosecuted by anyone on behalf of the trade union (in England and Ireland, and by the procurator fiscal in Scotland) and compelled to deliver up

such money, books, papers, etc. And the Court has power also to fine him up to £20, and make him pay costs up to 20 shillings.

It is also an offence for any officer or other person having money or security in his hands belonging to the union **wilfully to withhold or fraudulently misapply** the same. And it is a further offence for any officer or member, or person who pretends to be an officer or member, wilfully to apply the union's funds for any purpose other than those directed in the rules. This is a **most important** part of the Statute. To take a case: A union has called its members out on strike. By the rules, the funds are divided into two parts—one a fighting fund, to be used in case of strikes, lock-outs, and fighting in other ways for privileges; the other is a provident fund, which is by the rules directed to be applied for sick benefit, old-age pensions, and other like purposes. The strike is a long one: the fighting fund runs dry. The trustees and officers must not on any account utilise any part of the provident fund for strike purposes. It matters not a jot that funds for fighting are of the most vital importance. The statutory rule is clear; namely, that money is only to be applied for the purposes laid down in the union rules and for no other object whatever. Any trustee or officer disobeying the law may be ordered to repay the money so misapplied, and in addition is liable to pay a fine not exceeding £20 and costs not above 20 shillings.

In the cases in the last two paragraphs the officer proceeded against may be sent to gaol for three months if he does not hand over the goods and money and pay the fine and costs.

The **treasurer** is a most important officer. He carries the bag, and his opportunities for defalcations are greater even than those of the trustees. I have already shown (p. 771) how he may be called to account by the trustees and by the society (p. 772). It is always most important, in drawing your rules, to have a strict system of accounting by the treasurer. You should provide such means as you think best for assuring that the treasurer does not have large sums of money in his hands for a long time. The best plan is to make it a rule that a cash account of moneys received and expended be made out once every month. This should not be difficult, nor add greatly to the bag-carrier's work. Then he ought to be required to pay *all* money, every penny received by him, into the union's banking account at least once a week, and to produce slips signed by a bank official showing such payments in. All money required should be drawn out of the bank, and the cheques should be signed by the treasurer and countersigned by someone else—say a trustee or the secretary. In this way the risk of defalcation is minimised. That risk is heightened so soon as ever the treasurer is allowed to receive money and pay it away without banking it. Pass all your cash through the bank, is my advice. Moreover, it is needlessly throwing temptation in the way of a man—often a poor man—to allow him almost unlimited control over large sums of other people's money. He begins, perhaps, by borrowing a few shillings for some quite praiseworthy object, knowing it will not be missed until he has the chance to repay it. It is not missed—worse luck!—and easy is the descent of man. From shillings he begins to “borrow” pounds, and we all know what the end of it will be.



**Annual returns** are to be made to the Registrar of Trade Unions, comprising such particulars as he may require. The statement must be sent before the 1st of June in each year, and must comprise the following particulars:—

- (a) The assets and liabilities at the date of the statement.
  - (b) The receipts and expenditure of the union for the year.
  - (c) The separate expenditure on the several objects of the union: *e.g.* office rent, salaries, sick benefit, unemployed benefit, strike benefit, and suchlike matters.
- If these annual returns be not sent, there is a penalty on the union and on every officer of not exceeding £5 for each offence. Besides this, if anyone wilfully makes or orders to be made a false entry in the returns, he is liable to a penalty not exceeding £50.

By the Trade Unions (Provident Fund) Act, 1893, a considerable privilege is given to trade unions; for by that Act the income arising from any provident fund is allowed to go **free of income tax**. By "provident fund," is meant any fund for payment of sick benefit, old-age benefit, and benefit to members who are out of work, or have lost tools by fire or theft; or in aid of the funeral expenses of a member or member's wife; or as a provision for the children of a deceased member.

In the preceding pages I have shown how trade unions were, prior to the Act of 1871, associations of so illegal a nature that all trusts of property for them, and all agreements whatsoever, were void and worthless at law. I have also shown how the Act referred to legalises unions to some extent. It legalises them, that is, to this extent: they are now able to own property, to enforce their rights of property against their own trustees and officers and against all the world. Members have some security that their money shall not be misapplied; and unions are even admitted to certain privileges.

But all the same, **trade unions are still to some extent illegal bodies**, and are unable to enforce certain agreements. When the Act of 1871 was passed, Parliament seems to have regarded the matter in this light: "We will not allow members of unions to be debarred from rights of property, nor to be at the mercy of the unscrupulous and the designing; but we will not give them any assistance in any conflict with their masters." I may say here, perhaps, that the same law applies to masters' associations in regard to their relations with the employed. Such associations are, in fact, called "trade unions" in the Act of 1871.

In pursuance of this policy, the Act expressly declares that no union shall be able to enforce, in a court of law, an agreement with a member by which he binds himself to **pay subscriptions**. The idea is this: Suppose a man has signed a form of application for membership, and has agreed to pay subscriptions for so many years, or for his life, if the agreement were enforceable at law it would practically mean that the man would be bound hand and foot as a member of the union for that time. And if a strike of which he disapproved were declared by the executive, he would thus be compellable to pay towards keeping up that strike. On the same principle a member cannot be sued in a court of law for any penalty he has incurred under the rules of the union.

Equally, **an agreement to work or not to work** according to the union's decision is void at law; and so is an agreement by him with the union only to work for a particular rate of wages. In fact, with regard to this kind of agreement—which is entered into when a man agrees to become a member of the union and to abide by the rules—the law remains just as it stood before 1871. That law is explained on pages 765-7, and it may be stated thus: No man is allowed to fetter himself to the extent of agreeing not to work at such employment for such hours, for such employers, and for such wages as he pleases from time to time. From this it follows that it is merely a matter of honour for a workman to obey the orders of his union.

Just as a member cannot legally be compelled to pay his subscriptions or penalties incurred by him, so also he has no remedy against the union **if they fail to accord to him the benefits** to which the rules declare him to be entitled. This seems hard. No doubt Parliament had in mind strike benefit chiefly. But why all benefit should have been included, I know not. Still, it is the law, and I can only record it, that a man may have paid his dues to his union honourably and punctually for years, and yet the union can with impunity deny him sick benefit when he is sick, tool benefit when he has lost his tools, unemployed benefit when he is out of work. Not one whit of legal remedy has he; and his only course is to take steps under the rules of the society to convene a meeting and lay before his fellow-members his hard case.

The next kind of agreement that the Legislature declines to countenance is an agreement **"to furnish contributions** to any employer or workman **not a member** of such trade union, in consideration of such employer or workman acting in conformity with the rules or resolutions of such trade union." I daresay you see the drift of this. It is a common thing when a strike occurs, or when the masters lock-out the men, for the trade union to say to any non-unionists employed at the works, "Join us, and although you are not members of our society, we will give you strike pay at the same rate as we members receive." Hundreds of such agreements have been made in times past, and hundreds more will, I doubt not, be made in the future; nor have I ever heard of one such promise being broken. Yet they are no more than honourable understandings, having no legal force whatever.

Then we come to **agreements to pay fines** imposed by sentence of a court of justice. It is usual, when an agitation is in its active stages, for a trade union to promise to pay all fines imposed on members by reason of their having obeyed the orders of the union. Thus, if workmen who ought to give notice to quit work are ordered by the executive of the union to throw down their tools and leave without notice, the society invariably undertakes to pay the fines that are sure to be imposed (*see* p. 816). Such an undertaking is not lawfully binding, but is, like the preceding ones, an engagement of honour merely.

In the same category come agreements **between trade unions**. Thus, suppose the Carpenters and Joiners' Society is out on strike, and in order to make the action more effective it combines with (say) the Engineers'



Society, and the executives of the two unions agree that the Engineers shall contribute so much a week out of their war chest by way of strike pay for the carpenters and joiners; such an agreement is not enforceable at law. It is not illegal in the sense of being punishable; it is merely void—the Courts refuse to recognise it one way or another.

Last of all, there is no legal validity in any **bond given to secure the performance** of any of the agreements just enumerated. The way in which this clause operates is as follows: Suppose Jack Jones enters into an agreement under his hand and seal to pay £10 to William Smith (the secretary of the union) upon condition that so long as he (Jones) does not work for any master contrary to the rules and orders of the society, the money shall not be payable. That is the form which a bond usually takes. It is a sort of penalty agreed upon to enforce an obligation. By the Trade Union Act, such a bond as that sketched out above is invalid.

It is to be borne in mind that all the provisions of the Trade Union Act as to the legality or otherwise of agreements apply to combinations of masters exactly the same as to combinations of men. In fact, an association of masters for the purpose of regulating the relations between themselves and their workmen, is legally a trade union within the meaning of the Act. It is, I know, quite unusual to speak of a masters' association as a trade union, but such it is in the eye of the law.

**Strikes.**—Before the year 1875 a strike was generally an unlawful conspiracy, and was punishable as a crime. The law was not enforced so rigorously as it might have been, nor was every strike a conspiracy. Still, workmen who combined to coerce the master by a threat of doing something likely to operate to his injury were liable under the criminal law. For example, a master builder had in his employ certain men who had signed an undertaking or declaration that they would not engage in any strike of workmen. There were also working for the master builder a number of members of the Amalgamated Carpenters and Joiners' Society, who looked upon the declaration as a blow aimed at themselves. Accordingly they held a meeting one morning at breakfast-time, and passed a resolution "That Mr. — be given to understand that unless the men who are working under 'the declaration' in his shop be discharged, and we have a definite answer by dinner-time to that effect, we cease working immediately." This resolution was committed to the care of three delegates to be presented to the master, and they duly performed the task. By way of reply the master builder summoned the dauntless three for conspiracy, and the Court of the Queen's Bench decided that the combining to present such a resolution was an illegal conspiracy. Chief Justice Cockburn said, "If several persons in the employment of a master consider others in that employment obnoxious, either personally or on account of their character or conduct, they have a perfect right to put to their employer the alternative whether he will discharge the obnoxious persons and retain their services, or lose them and retain the obnoxious persons. But if men go farther than that, and do not fairly put the alternative to the master, but seek to coerce him by the threat of doing something which is likely to operate to his

injury if he does not discharge from his employment certain other persons against whom they have some objections, it is an illegal proceeding and brings the men within the Statute."

Let me point out that if one man had gone to the master and threatened to throw down his tools and so cause inconvenience and injury to his employer unless the non-unionists were dismissed, he would not have been guilty of any crime. But it is the law of England that if several persons conspire to do something to the injury of another, the conspiring is in itself a crime; though if one person alone had inflicted the injury, he would not have come within the criminal law. For instance, if I go into an auction room and make a bid, never intending to buy the article; or if I see that Jones, who is no friend of mine, particularly wants something, and I bid against him merely to run up the price, that is no offence on my part, though it is a fraud on Jones. But if I conspire with the auctioneer that I shall attend and bid at the auction for the express purpose of running up the thing so as to sell it grossly beyond its real value, the auctioneer and I are guilty of a criminal conspiracy. The "mock auctions" so prevalent in London, where a man hires a room and sells "works of art" by auction, being assisted by confederates who pretend to be bidders, are conspiracies to defraud.

I want to make it plain that a conspiracy may be criminal, even though the act conspired to be done is not itself criminal. The crime is in the conspiracy. And it was under this law that strikes and combinations of workmen against employers were sometimes held to be criminal.

This state of the law existed until 1875, when it was altered, so far as disputes between masters and workmen are concerned, by the Conspiracy and Protection of Property Act, section 3: "An agreement or combination by two or more persons to do or procure to be done any act *in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime.*" On examining this section it is seen that the simple effect of it is to remove the concerted action of masters or men in a trade dispute outside the law of conspiracy. It does not legalise strikes; that is to say, it does not take strikes and lock-outs under the protection of the law. But the section makes **strikes of themselves no longer criminal**. The only cases in which strikers can now be convicted of unlawful conspiracy are when (1) they unite to do something which would be criminal if one of them did it singly; (2) when one set of men combines against another man or set of men; and (3) when men combine against a master who has no present dispute with his own men in order to put pressure on an employer who has a dispute with his men. Strikes and lock-outs are like civil war for bitterness, and used at one time to be conducted on the lines of physical force. Workmen would smash the masters' machinery, assault and seriously injure "blacklegs," and in Sheffield they once resorted to blowing up the houses of obnoxious persons by gunpowder. The employers, on the other hand, provoked the men as much as possible, so as to bring about collisions with the police; prosecuted them for conspiracy, and themselves or their co-employers sat on the magisterial



bench to administer what they were pleased to call law and justice. These methods of warfare are now practically obsolete. Moral suasion and public opinion are relied on by both sides. The most usual way in which strikers come into collision with the police law is in the matter of

**Picketing.**—Picketing consists of the men out on strike or locked out, or the union to which the men belong, placing some of their number at or near to the entrance to the works, with the mission of reporting any workman who goes there to work. The pickets also dissuade those who are about to apply for a job at the works, and persuade any men who may be at work there to join the strike. Let me say at once, that so long as picketing is confined to giving information, there is nothing unlawful in it.

Lord Bramwell, one of the great masters of the Common Law, thus stated the matter as it existed before the Conspiracy Act, 1875: "If picketing should be done in a way which excites no reasonable alarm, or does not coerce or annoy those who are the subject of it, it is no offence in law. It was perfectly lawful to endeavour to persuade persons who had not hitherto acted with them [the strikers] to do so, provided the persuasion did not take the shape of compulsion or coercion."

The Conspiracy Act (section 7) defines those acts of picketing which are illegal, rendering the offender liable to a fine not exceeding £20 or imprisonment for not more than three months. The section defines the offence as that of endeavouring to compel any other person to do any act which he has a right to abstain from doing, or to abstain from doing any act which he has a legal right to do. The compulsion may be in the following way: "Watching or besetting the house or other place where such other person resides, or works, or happens to be; or the approach to such house or place." If the section stopped here all picketing would be illegal. But a proviso is inserted at the end to the effect that attending at the house, or work, or other place in question, in order merely to obtain or communicate information is not watching or besetting within the meaning of the Act.

**To what extent, then, can picketing lawfully be carried?**—It is certain, in the first place, that if men are posted on picket duty in order to annoy the employer, they are guilty of an offence against the Act. If they are placed there in order to annoy men who refuse to act with them, again they are guilty. But it is perfectly lawful for men to guard all the approaches to the works in order to inform intending applicants for a job of the facts of the case, to tell them that there is a strike or lock-out, and to place before them the strikers' view of the origin and merits of the quarrel.

The standing statement of the law on this point is contained in a charge to the grand jury at the Old Bailey by the Recorder of London in 1875. In November, 1874, a dispute occurred between the firm of Messrs. Jackson & Graham and the Alliance Cabinet-makers, to which society most of the firm's workmen belonged. One Friday notice was given in the shop that in future men would only be employed on piecework, that all the men willing to work on those terms were to give in their names, and that the rest might consider themselves discharged. The men's union took up the position that the men

should not work on the piecework system, and accordingly none gave in their names and all stayed away from the shop. As usual, one or two men who were non-unionists remained at work on the employers' terms. Very shortly afterwards the system was adopted of four or five men parading up and down in front of Messrs. Jackson & Graham's place of business. When anybody appeared on the scene who was about to apply at the premises for work, the pickets met them, told them of the strike, and advised them not to go in. They also promised such persons strike-pay so long as the contest lasted.

It was not pretended that there was any threat held out by the pickets, nor that they did not behave themselves quietly and peaceably. The pickets were charged at the Old Bailey with conspiring to molest and obstruct Jackson & Graham in their business of cabinet-makers.

The learned Recorder stated the law thus:—"If you think their conduct may be accounted for by a desire to ascertain who were the persons working there, or peaceably to persuade them or any others who were proposing to work there to join their fellow-workmen who were contending, rightly or wrongly, to act for the interests of the general body, it seems to me that there is no evidence sufficient to establish the charge that is here made. Did they conspire together, first, by the exhibition of force, to obstruct the passage of persons to the place of business, and by that exhibition of force to deter them from taking a line contrary to that of the persons exhibiting that force; or did they conspire, by terror and intimidation, to deprive the men of their free will to bestow their labour just where they thought fit? If they did that, it seems to me that they have laid themselves open to a criminal charge. But if, on the contrary, they were only there peaceably to warn persons that there was a strike, and peaceably to tell them that it would be to their interest to join their strike . . . if they merely did that, I cannot see any ground upon which this criminal charge exists."

Trade-unionists have here a guide as to the scope of picketing. An exhibition of force is criminal. Threats of force are criminal. But peaceable persuasion and argument are not criminal.

It may be, however, that peaceable picketing will bring strikers into conflict with the law. The law is that pickets may give information; but it has been decided that **they act unlawfully as soon as ever they try to persuade non-strikers not to seek employment** at the obnoxious employer's place of business. Lyons & Sons had a dispute with their men, and the men, who belonged to a union, all came out. The union picketed the works and gave each picket a supply of cards to distribute, bearing the words "You are hereby requested to abstain from taking work from Messrs. J. Lyons & Sons pending a dispute. Members are also requested to use their influence to keep non-society men from applying for work until the dispute is settled." The pickets accosted all persons going to the works, handed them these cards, and tried (generally with success) to persuade them not to apply for work. Lyons & Sons applied to the Court for an injunction to stop the secretary and executive chairman of the union from conspiring together to induce persons not to enter into contracts with them (Lyons & Sons). And they succeeded. The result



is that so long as pickets confine themselves to stating facts, they are all right ; but if they begin to add persuasion, they are all wrong. They may say, to intending applicants, "There is a strike here. The master has behaved badly and has tried to cut down our wages." In fact, they can relate the whole history of the dispute ; but if they add, "Don't apply here for work," they are all wrong. I know the thing is commonly done ; and I simply want to tell workmen the risk they run and how far they can go.

Besides forcible picketing, trade-unionists and others engaged in trade disputes must be careful not to attempt to coerce others into joining their movement by **using violence or intimidation**. The word "intimidation" is one that has a fairly extensive meaning. Its popular rendering is "frightening," and this is a pretty accurate interpretation ; and the frightening must be understood to refer to frightening by some threat of personal violence. In some districts magistrates of the unpaid variety strain this statutory word ; but workmen may take it that, upon the authority of five of her Majesty's judges, the word "intimidation" used in the Conspiracy Act, 1875, means "such intimidation as implies a threat of personal violence." The section deals, in fact, with violence actually used or threatened. Men engaged in a trade dispute should always be careful of the language that they use to other workmen who take the opposite side. Such phrases as "If you don't do so-and-so we will make your life a burden to you" should be studiously avoided.

In 1891 one Gibson was employed as a fitter in the yard of an iron ship-building company. This Gibson was a member of an association called the National Society. Most of the men in the yard were members of the Amalgamated Society of Engineers, and they took umbrage at the employment of Gibson in the yard. At a meeting of the Amalgamated Society men they resolved to strike unless Gibson left his society and joined theirs, or else was dismissed ; and one of their number, named Lawson, was employed to convey the resolution to the employers. This Lawson did, with the result that, to avoid a strike at an inconvenient moment, Gibson received marching orders. Then Gibson summoned Lawson for intimidation, the intimidation being this: "I was afraid because of what Lawson said that I should lose work, and should not get employment anywhere where the Amalgamated Society predominated numerically over the National Society." The magistrates thought this a little too thin and dismissed the summons ; whereupon Gibson, or those behind him, appealed to a higher Court, but with no better result. "There is nothing," said Lord Coleridge, on behalf of himself and his brother judges, "which under any reasonable construction of the word 'intimidate' could be brought within it."

In another case Mr. Treleaven, a shipowner of Plymouth, insisted on employing non-union men. The trade-union secretaries told him that if he did not cease such employment they would call their men out. Mr. Treleaven declined to be interfered with, and continued to take on non-unionists, and thereupon the secretaries issued this notice: "Inasmuch as Mr. Treleaven still insists upon employing non-union men, we, your officials, call on all union men to leave their work. Use no violence, use no immoderate language, but

quietly cease work and go home." The union men obeyed the behests of their leaders, and Mr. Treleven promptly summoned the three secretaries who signed the notice, for "intimidation." The magistrates found them guilty, and the Recorder of Plymouth, on appeal, affirmed the conviction. But hear her Majesty's judges, by the mouth of the Lord Chief Justice: "We say that to tell an employer that if he employs workmen of a certain sort the workmen of another sort in his employ will be told to leave him, and tell the men when the employer will not give way to leave their work, use no violence, use no immoderate language, but quietly cease to work and go home, is certainly not intimidation within any reasonable sense of the Statute."

The Statute endeavours to prevent any evasion of its spirit by proceeding to enact that using violence to or intimidating the wife or children of a man shall be considered the same as using violence to or intimidating the man himself. This is only a recognition of a very old principle of the common law, which always placed violence to a man's wife or children on the same footing as violence to the man himself.

Another offence under the Conspiracy Act is for strikers or their sympathisers **persistently to follow a person about from place to place.** This is one of the things for which men on strike are most commonly convicted, and it behoves all well-conducted unionists to beware of it. That the law is bound to notice such conduct is plain, for nothing can be more conducive to a breach of the peace than for a man to find his footsteps dogged. It should be observed that the offence of "persistently following about" is committed even when the followers do not speak a word either to the man they are following or to anyone else. The mere fact of *persistently* following him is enough. And the offence can be committed by one man.

In both these respects the crime differs from the next, which is "**following such other person with two or more other persons in a disorderly manner in or through any street or road.**" The object of this sub-section is to prevent a "blackleg" or unpopular employer from being made the object of the public attentions of a disorderly crowd. To constitute the crowd there must be at least three persons; and "booing," groaning, hustling, or other conduct of that kind constitutes disorder within the meaning of the Act. Trade-unionist leaders should be particularly careful to caution their men not to follow and hoot at blacklegs in the street. Nothing puts up the back of the police more readily, and no offence is more severely handled by magistrates.

The last of the offences specified by the Conspiracy Act of which men on strike are liable in moments of wrath and excitement to be guilty are: (a) **injuring the property** of the obnoxious person; and (b) **hiding his tools, clothes, or other property** owned or used by such person, or depriving him of or hindering him in the use thereof. An old member of the Bar, who comes from Sheffield, tells me that this section is aimed at such proceedings as characterised a great strike in the cutlery city some few years ago. Amongst other classes of workmen, the grinders were "out." These grinders work each at his wheel, to which power is conveyed by means of a leather band. When the machinery is running at full power this band revolves with incredible



velocity, and is subject to a very considerable strain. Should it break or fly off, the consequences are apt to be serious, the grinder at work being frequently injured and not seldom killed outright. Now, grinders seem to be a rough lot, or, at least, they were rough in those days: implacable to a foe, though steadfast to a friend. And one of the weapons with which they fought was the cutting of the bands of blacklegs. Someone would contrive to make a cut, deep but almost imperceptible, in the leather; and should the wretched blackleg not discover it in time, he would be startled in the midst of his work by a sudden snap, a leap of the stone, and then——! Nowadays trade organisations are too well-managed and too strict to permit their members to fight with such weapons.

At the same time, it is curious how, when a dispute is in progress, men who wish to work when the majority intend to strike, lose their tools. The things seem bewitched. But if the wizard should be discovered, he must be prepared to face the consequences of his witchcraft—to the tune of a fine of not more than £20, or three months' imprisonment (or less) with or without hard labour.

Provided that the dispute is between masters and men, and is conducted without any violence, intimidation, or molestation of masters and non-strikers, there is, as a rule, nothing illegal in it. I say, "as a rule," because **in a few exceptional cases strikes are criminal**. By section 4 of the Conspiracy Act it is a punishable offence for any workman to break his contract—that is, to throw down his tools and stop work without giving due notice to leave—when he is in the employment of any company, or contractor, or municipal authority whose duty it is under an Act of Parliament to supply a town or place with **gas or water**. But it is only criminal when the striker knows that the probable consequence of his stopping work, and of others stopping work who are acting in combination with him would be to deprive the inhabitants of the town or place wholly or to a great extent of their supply of gas or water.

As far as I can see, this offence could only be committed when there was a pretty general strike at a gas- or water-works. Suppose, for instance, that the men in the employment of the gas department of the Birmingham Corporation were to have a dispute with the Corporation on the wages question; and the Gasworkers' Union sent in an ultimatum to the City Fathers that if a promise of an extra 2s. 6d. a week all round were not made, the men would cease work next day. And suppose the men did cease work the next day, they would all of them, in every probability, be liable to penal consequences—a fine of not more than £20, or not more than three months' imprisonment.

The same penalty is imposed (section 5) on any person who wilfully and maliciously breaks a contract of service or hiring, knowing or having reasonable cause to believe that the result will be to **endanger human life**, or to cause serious bodily injury, or to expose **valuable property** to destruction or serious injury. I am happy to think that this part of the Act is rarely appealed to. It would apply, for instance, to a strike of a large number of railway servants, who at a given hour suddenly deserted their posts. The

pointsmen and signallers would be liable for endangering life, and drivers and others for exposing valuable property to serious injury.

The only way, then, for railway servants and gasworkers and waterworks men to strike so as to keep outside the criminal law is by all handing in their notices.

It is also criminal to conspire against another set of men—for instance, for the men of one society to combine to prevent the men of another society from getting work; for the Acts of Parliament only legalise certain acts done when the dispute is between employers and employed.

**Unionists and non-unionists.**—An important question remains to be considered which nominally does not concern trade-unionists any more than it concerns other people, but which really is of the greatest importance to officials and members of trade organisations. As I have shown you, if union men go to their employer, or an official on their behalf goes and says, "You have taken on some non-unionists: unless you promise to dismiss these men, all the union men will come out," this is no offence against the criminal law. But it has been alleged that if the employer accedes to the demand, or request, or whatever you like to call it, the workman who is dismissed can bring an action for damages against the persons who procure his dismissal—that is, the deputation or trade-union official who acted on behalf of the union men. The foundation of the claim made is this: If I, to secure an end of my own, procure Jones to break a contract with Smith, to Smith's harm, Smith must have the right to proceed against me for causing him an injury. The case becomes worse against me if I *maliciously* induced Jones to break the contract with Smith.

Quite apart from labour questions, damages have been given against persons who have maliciously induced A to break his contract with B.

It may be conceded that it is an actionable wrong to induce a man to break his contract with another—by "break" it I mean to throw it up then and there so that he himself would be liable for breach of contract. Suppose, that is, A has a workman, B, who is subject to a week's notice. I go to A and maliciously persuade him to dismiss B without any notice whatever, and for no fault of B's own. It is not difficult to understand that B ought to have a right of action against me.

But suppose I merely induce the master to give B his week's notice. What then? Has B any right against me? Or, to take another case, suppose B is not engaged, but is applying for a job, and I say to the master, "If you engage this man, all the union men shall go out." What then? Has B any right against me because I—for some purpose of my own, if you like—induced A not to enter into a contract with B at all? Such were the questions discussed in the celebrated case of *Flood v. Jackson* and others—a case of such importance, that for the first time in twelve years the House of Lords requested eight judges to attend that august tribunal and give it the benefit of their advice.

Flood and another non-unionist were shipwrights and ship-repairers, and Messrs. Jackson, Knight and Allen were members of the United Society of



Boilermakers and Iron Shipbuilders, whose head office is at Newcastle-on-Tyne. Jackson was chairman of the union, and Knight the general secretary; Allen, the third defendant, was district delegate for London.

In April, 1894, Flood and his mate got a job at the Glengall Iron Company's dock at Millwall, to do some repairs to the woodwork of a ship. The repairs to the ironwork were being carried out by men who were all members of the Boilermakers and Iron Shipbuilders' Union. All the men were employed by the day, and could either leave or be dismissed at the end of any day without previous notice. Now Flood and his friend were well known to the unionist ironworkers, for they themselves had worked at ironwork on ships at Messrs. Mills & Knight's dock at Rotherhithe. The Boilermakers and Iron Shipbuilders' Union had determined to put down the practice of shipwrights (*i.e.* men who work on the wooden parts) being employed on ironwork. Consequently, as soon as Flood and his mate were seen to be at work in the Glengall Company's yard, the union ironworkers held a meeting and resolved to throw down their tools rather than work on the same job as the two obnoxious shipwrights. This determination the men conveyed to Allen, the district delegate; and I must say that Allen seems to have behaved very well. He went down to Millwall, saw the men, told them they must not act hastily, but must wait the decision of the executive council of the union. Meanwhile, he himself would see the manager of the Glengall Company. He did see the manager, and that gentleman, to avoid a strike, paid off Flood and his boycotted friend at the end of the day, with an intimation that their services would no longer be required. Then the music began; for Flood and his mate brought an action against Allen, and also against Messrs. Knight and Jackson, the chairman and general secretary of the union. With regard to these two gentlemen, the matter was soon settled. It was proved they knew nothing about the business from beginning to end, and that Allen had never communicated with them or got their authority to negotiate with the company. Flood's counsel then said, "That may be, but Knight and Jackson are both members of the union. Allen is the servant of the union; therefore, all members and every member must be liable for what Allen did." This contention was overruled, on the plain ground that Allen was not the servant of the members of the union; and the whole argument fell.

The only question left was this: The jury having found that Allen maliciously (that is, to forward the ends of his union and with intent to injure the plaintiffs) caused Flood and his friend to be dismissed—or, rather, not to be taken on again—was Allen liable to Flood and his friend in damages?

After the case had been argued twice over before a full bench of the House of Lords, that Court decided that Allen was not liable. This decision makes clear the right of unionists to refuse to work with non-unionists. They can go to the master, by their delegate, and say, "The union men object to work with this man or that man; and if he is re-engaged, the unionists will not re-engage themselves." But be sure to remember that it is still unlawful for the delegate (or any other person) to persuade the master to **break his contract** with the objectionable workman; that is, to dismiss him without proper notice, and so on.



*[Photo: Payne Jennings, Ashted.]*

THE FOUR COURTS, DUBLIN.





## SECTION II.

## FRIENDLY SOCIETIES.

Their antiquity—The Friendly Societies Act, 1896—No legal protection or privileges unless registered—Danger of unregistered societies—What are “friendly societies” within the meaning of the Act?—Friendly societies proper—What societies are not “friendly”—Are voluntary associations—Cannot sue for subscriptions or fines—Cattle insurance societies—What is “customary employment”—The versatile lawyer’s clerk—The shovel-hat does not make the bishop—How to register a society—The protection of funds—Auditors—Public auditors—Must hold a quinquennial valuation—Or else send a special return—Societies with branches—Seceding branches—You cannot secede and then claim benefit—Contributions by societies to a common fund—Medical societies—Special rule—Hospital subscriptions—The trustees—Advantage of having more than one—How appointed—Who may be appointed—Investment of funds—New trustees—Precaution against defalcations—How to proceed against a suspected official—Payments on death of members—Nomination—When there is no nomination—When there is a will—And when there is no will—Who are the next of kin?—Legitimacy—A handy bit of law—Paying the wrong person—People who disappear—Children’s insurance—Limit fixed by the Act—The rules—What they must contain—How amended—Amendments must be registered—Rights of members—Militiamen and volunteers—Disputes and the settlement of them—Loans to members—Loan funds—Collecting societies—Different rules—Industrial insurance companies.

NOBODY knows how old Friendly Societies are; for associations for the purpose of mutual relief and assistance in sickness and old age have existed in Europe for centuries. In the United Kingdom such societies were first recognised by the Legislature in 1793. An Act of that year permitted such societies to have their rules confirmed by Justices of Peace and enrolled with the Clerk of the Peace, and thereby to obtain certain privileges. From that time to the present a number of Statutes have dealt with Friendly Societies, forming a labyrinth of legislation not easy to be threaded. Speaking broadly, the objects of all these Acts have been to encourage the formation of such associations; to provide cheap, quick remedies against dishonest officials; to exempt the property of such societies from the necessity of formal transfer from one set of trustees to another; to protect the funds against misapplication and to provide an inexpensive method for settling disputes. At last, in the year 1896, the much-needed reform came in the shape of a consolidating and codifying Act—the Friendly Societies Act, 1896—which placed the law in a more comprehensible form.

**Registration** is the step necessary to be taken to secure to the members of a friendly society a legal standing and the protection of the Friendly Societies Acts.

**Unregistered societies are dangerous.**—The legal position of them is obscure, and any lawyer will tell you that obscurity is a tremendous disadvantage. In the first place, such a society is not a partnership, because it does not “carry on business” within the meaning of the Partnership Act; and again, the Companies Act, 1862, declares that all associations of more



than twenty persons having for an object the acquisition of gain, either by the association or by the individual members, is illegal unless registered under that Act or formed under some other Act of Parliament (*e.g.* the Friendly Societies Act). An unregistered society formed before 1862 can obtain some sort of protection for its property, and its members can enforce by action in a court of law the benefits they have contracted to receive. But the proceedings are cumbrous and expensive.

But an unregistered society formed after 1862 cannot maintain any action to enforce its rights. There are five kinds of societies that can be registered under the Friendly Societies Act. They are:—

(1) *Friendly societies proper.*

(2) *Cattle insurance societies* for insurance against loss by death of neat (cattle), sheep, lambs, swine, horses, and other animals.

(3) *Benevolent societies.* The distinction between a benevolent society and a friendly society is that the former must be established for the purpose of providing benefits for persons other than members, their wives, or relatives. Thus a society to provide pensions for the widows of miners killed by accident is benevolent; but if only the widows of members are allowed to participate, it is friendly.

(4) *Working men's clubs* to promote social intercourse, mutual helpfulness, mental and moral improvement, or rational recreation. Thus you could register a working men's gymnastic society, or, I daresay, a cricket club. The members of working men's clubs and benevolent societies are not entitled to nominate any person to receive benefits from the society.

(5) *Societies for any purpose authorised by the Treasury* as a purpose to which the powers and facilities of the Acts ought to be extended. Under this sub-section the Lords of the Treasury have certified certain purposes as proper for the Act to be applied to. The list may at any time be added to:—

- (a) To create funds by monthly or other subscriptions to be lent out to or invested for members, or for their benefit (*e.g.* loan societies).
- (b) Assisting members out of employment.
- (c) Protecting and defending members of any lawful trade or calling from frivolous, malicious or vexatious legal proceedings, and, in case of robbery or other crimes, affording them legal assistance for the detection and prosecution of the offenders.—*This appears to have been intended to meet licensed victuallers' protection societies.*
- (d) Promoting agriculture or horticulture.—*This gives village horticultural societies a chance of protecting their funds.*
- (e) The promotion of the pursuit of angling.—*Shades of the gentle Izaak!*
- (f) The playing of the game of quoits.—*Why not cricket, bowls, golf, and croquet?*
- (g) The encouragement and promotion of the riding of bicycles and similar machines.—*Since when did cyclists need encouragement?*
- (h) The promotion of education; also of literature, science, and the fine arts.
- (i) The promotion of the science and art of cookery.—*Good news for paterfamilias.*
- (j) Providing the members with legal and other assistance when claiming compensation under the Employers' Liability Act.
- (k) To promote thrift among the labouring classes by affording them the opportunity of depositing their savings and receiving interest on the same.—*Penny Banks, to wit.*
- (l) Guaranteeing the performance of their duties by the officers of friendly societies or branches.

- (m) The promotion of a knowledge of music.
- (n) The receipt of the funds of friendly societies and branches, and the investment of the same for their benefit.
- (o) Enabling persons of the Jewish religion to provide for the celebration of the Passover and its attendant expenses.
- (p) The mutual protection and promotion of the interests of friendly societies.

The object of this part of the chapter is to deal with **friendly societies proper**, and therefore my first business is to say what a friendly society is.

**DEFINITION.**—A Friendly Society is an association of at least *seven members* for the purpose of providing by *voluntary subscriptions* of members (with or without outside donations) for any *one or more* of the following objects:—

(a) The relief and maintenance of the members, their husbands, wives, children, fathers, mothers, brothers or sisters, nephews or nieces, or wards being orphans, during sickness or other infirmity, whether bodily or mental, in old age (which shall mean any age after fifty) or in widowhood, or for the relief or maintenance of the orphan children of members during minority; or

(b) Insuring money to be paid on the birth of a member's child, or on the death of a member, or for the funeral expenses of the husband, wife, or child of a member, or of the widow of a deceased member, or (as respects persons of the Jewish persuasion) for the payment of a sum of money during the period of confined mourning; or

(c) The relief and maintenance of the members when on travel in search of employment, or when in distressed circumstances, or in case of shipwreck, or loss or damage of or to boats or nets; or

(d) The endowment of members or nominees of members at any age; or

(e) The insurance against fire (to any amount not exceeding £15) of the tools or implements of the trade or calling of the members.

**The line of exclusion.**—In order to exclude purely insurance societies not of the true workmen's Friendly Society kind, it is provided that no society which ensures to a member or a member's nominee an annuity of more than £50, or a gross sum of more than £200, shall be registered under the Friendly Societies Act. But for some such proviso, all **life insurance offices** would be able to register under the Act, and so evade many payments to the revenue—payments which, as a rule, they can well afford to make, but which are not exacted from friendly societies.

**Trade unions** are also excluded from the requirements and benefits of the Friendly Societies Act; they have an Act all to themselves. But trade unions which insure the lives of members, their wives and children, are subject to section 62 of the Friendly Societies Act on the subject of child life insurance (*see p. 799*).

I will now shortly deal with **points of dispute** that have arisen on the section (8) which defines a friendly society. In the first place, **subscriptions** are voluntary. They cannot be sued for in any law court, and this makes it necessary to provide in the rules of such a society for the consequences of not paying subscriptions and fines. Generally, the rule is that no member who is in arrear shall be entitled to receive benefits. **Fines**, I should say, stand on



the same footing as subscriptions. There is no legal claim for them by the society. There is **an exception** in the case of cattle insurance societies (*see* p. 786). These associations are generally of farmers, graziers, dairymen, carriers, and other persons who use horses and cattle in their business, and they are conducted on the "whip-round" principle. That is to say, the members bind themselves to contribute up to so much if the horse or cow of one of their number dies. Suppose Giles belongs to one of these clubs. His cow dies of disease, and he makes a claim on the society for £12. Suppose there are thirty-six members, the secretary levies 6s. 8d. apiece on them, and this they must pay if by the rules of the society they ought to. And if they do not pay they can be sued in the County (or Small Debts) Court.

There was once a friendly society which by its rules was to give a sum of so-much to the **wife**, or, if there were no wife surviving, to the children of a deceased member. A member, whom I will call John Jones, was married when first he joined the society to Susan, who died, and John consoled himself with a second wife, Mary. Then John died and Mary claimed the wife's benefit. But the ingenious secretary refused to pay, on the ground that the only "wife" who could claim the insurance money was Susan, who was John's wife when he first insured by joining the society. The Court, however, made short work of this humorous contention, and decided that the "wife" entitled was the lady who was John's wife when he died. "Wife" implies lawful marriage and "children" means legitimate children.

It should be observed by those who conduct the business of societies which provide sick benefit, that **sickness includes insanity**. Thus, when the rules provided for relief during "any sickness or accident," it was held by the Court of Queen's Bench that a member who had become insane was "sick," and entitled to benefit. If it is not intended to grant relief in cases of insanity, the rules should clearly say so.

By the Poor Law Amendment Act, 1879, when a member of a friendly society is a pauper lunatic and is entitled to benefit from the society, the Poor Law Guardians can only claim to receive the benefit when (1) the pauper lunatic has no wife or other relation (including children, parents, and grandparents) dependent on him; (2) the Guardians must declare that they are only granting parish relief by way of loan, and within thirty days must give notice to the secretary or trustees of the friendly society.

**What is customary employment?** was the question raised in one case. Blank had been for some years a member of the Manchester Law Clerks' Society, which provided for a permanent allowance to a member permanently incapacitated from following his customary employment of a law clerk. Blank's health was none of the best; he could not endure the close confinement of a solicitor's office, so he became collector to a brewery for a time. Everybody knows that there is nothing in trade which affords so much exercise as the collection of accounts. Blank seems to have found the life too exhilarating, for he dropped it and became a merchant's clerk, being unable at the time to obtain a situation in a lawyer's office. Ere long the fascinations of account-collecting drew him once more to the brewery, and he oscillated between that

establishment and various merchants' offices until old age and incapacity supervened. Then Blank came on the Law Clerks' Society for an annuity. They refused to pay, and the case came into Court. The Manchester Law Clerks are doubtless a wily lot, but they met more than their match in brother Blank, who, reared in a solicitor's office and nurtured on the collection of overdue accounts, was an epitome of all subtlety. He proved that, notwithstanding his several years' collecting experiences and his employment by merchants, his customary employment (when he could get a berth and was well enough to take it) was that of a law clerk. Wherefore he was adjudged to be entitled to his pension. So, we see, a man does not cease to be a law clerk because stress of circumstances constrains him to collect the debts of brewers, nor a stonemason because trade is bad and he takes a light job as a street scavenger, any more than a bishop ceases to be a bishop because he is wrecked on a desert island, where the natives deprive him of his apron, denude him of his gaiters, and confiscate his shovel-hat.

**How to register.**—First of all, it is necessary for at least seven persons and a secretary to draw up rules of the proposed society. Copies of the rules must be sent to the Registrar of Friendly Societies. In England the office of the Registrar is in London; in Scotland there is an assistant Registrar with an office in Edinburgh; the Irish assistant Registrar is to be found in Dublin. When a society carries on its operations in more than one part of the United Kingdom, it must be registered in the country where the registered office is situate. Copies of the rules, however, must be sent to the Registrars of the other parts of the kingdom to be recorded.

The Registrar **may refuse to register** if the rules sent to him do not comply with the Act (*see* p. 800). It was formerly the practice to refuse to register friendly societies which provided for a division of some part of the funds amongst members periodically. But by section 15 the Registrar must now register such societies, so long as the rules provide distinctly for meeting all claims upon the society before such a division takes place. If you want to register under the Act, and the Registrar refuses your application, you may appeal to the judges. The High Court in England and Ireland, and the Court of Session in Scotland, have jurisdiction to compel the respective Registrars to register a proposed society.

Along with the rules there must be sent an **application** to register the society, **signed by seven members** and a secretary. A list of names of officers, secretary, and trustees must accompany it.

In the case of **societies with branches** a list of all branches and the registered office of each branch, the rules of each branch, and the list of its trustees, officers, and secretary authorised to sue and be sued on behalf of the branch, must accompany the application for registering the parent society. It frequently happens that branches have no separate rules or officers, and in that case an intimation to that effect should be made to the Registrar.

Just as in the case of a trade union, every society and branch is bound to have a registered office, the address of which must be sent to the Registrar. Any change of address must also be notified to that official under a penalty of £5.



## PROVISION FOR PROTECTION OF FUNDS.

Every registered society and branch must submit its accounts for **audit at least once a year**. If the society or branch chooses, it may appoint its own auditors under its rules. Let me advise the members of friendly societies to insist on a rule by which the members at the annual meeting appoint auditors. Never allow the committee or trustees to choose them. And always propose professional accountants to do the work. The accounts of a friendly society in a large way of business are complicated enough to call for expert treatment. Nothing is easier than for a fraudulent treasurer or collector to cook his books so as to deceive amateur accountants. Professionals are sometimes taken in; but there is less risk of a swindler trying to cover his defalcations when he knows that his books will be scrutinised by skilled men. You must appoint at least two auditors.

It is even a better plan, nowadays, not to have any auditors at all; for the Treasury has the power to appoint **public auditors** to audit Friendly Societies' accounts. The society or branch employing one of these officials has to pay from one to five guineas for his services. The rest of his remuneration is paid out of public funds. I rather think it was a mistake not to compel every society and branch to have its accounts annually scrutinised by one of these public officers. But Parliament in its wisdom left the matter optional.

Every registered society and branch is obliged to make an **annual return** not later than the 31st of May in each year, and to send it to the Registrar. The return **must contain** a true account of the receipts and expenditure, funds and effects, as audited. It must show separately the expenditure in respect of the several objects of the society or branch. Thus, if the society has spent £1,000 in sick benefit to members, £500 in pensions to widows of members, £150 in office expenses, all these items must appear separately. It must also state whether a public auditor was employed, and if so, who. If a public auditor was not employed, the name, address, and calling or profession of the auditors must be given, together with the manner in which and by what authority they were appointed. Thus: "The accounts were audited by Messrs. John Brown and Thomas Smith, of 12, High Street, Huddlebridge, chartered accountants, who were appointed by the annual meeting under rule 10." The return must be made out as for the year ending the 31st of December, and, if the auditors made any special report, a copy thereof must accompany the annual return.

The auditors must verify this return. If they find it correct, they must sign it as "Correct, duly vouched and in accordance with law." Unless they are able to certify these things, they must make a special report to the society, showing in what particulars it is incorrect, unvouched, or illegal.

Friendly societies proper, and every registered branch, are compelled by the Statute to have a **five-yearly valuation** of assets and liabilities, and must send to the Registrar a report on the condition of the society. The valuer is to be appointed by the members, who may, if they please, employ a man appointed by the Treasury, whose small fee the society or branch must

pay. The valuer signs the report which is sent to the Registrar, which must contain an abstract *made by the valuer* of the results of his valuation, with a statement of full particulars of the benefits assured and contributions receivable, and of the funds and effects, debts and credits of the society. Instead of a valuation, the society or branch may send **every five years a return** of the benefits assured and contributions receivable by the society, and of all its assets and liabilities, accompanied by such evidence of the truth of the return as the Registrar prescribes. In this case the Registrar's duty is to have a valuation of the assets and liabilities made by an actuary, and a report of the valuation sent to the society or branch.

It is the duty of every society and branch to keep a copy of the last annual balance-sheet, the last valuation, and any special report of the auditors always hung up in a conspicuous place at the registered office.

**Societies with branches** are the subject of a good many rules. Whenever a new branch is established, it must be registered in the same way as a branch of a new society (*see p. 789*). All the rules relating to registering amendments of rules and appointment of trustees and officers apply to registered branches as well as societies. There is no need to register each branch of every society. When the society has under the control of a central body a fund to which every branch is bound to contribute, it can be registered as a single society. Where there is no such central fund, every branch must be registered separately.

Sometimes it happens that a **branch secedes or is expelled** from the parent society, and sets up a little society on its own account. Such a proceeding is not favourably regarded by the powers that be. When a body which has been registered as a branch applies to be registered as a society, the Registrar cannot accede to the application unless the applicants produce a certificate that the branch has wholly seceded or been expelled. This certificate must be signed by the chief secretary or other principal officer of the parent society. But the chief secretary or principal officer is not like Brer Rabbit, who, as you remember, could do "what he dern well please." Some societies possess rules dealing with the question of secession—providing, for instance, that no resolution of the branch for secession will be recognised unless all contributions due to the society have been paid up to date. Whatever these rules may be, they must be observed by any branch wishing to secede. Otherwise the parent society has the right to decline to give a certificate of secession. But if the rules are complied with, the certificate must be given, and, should the secretary refuse to give it after he is requested so to do in writing, he will incur some trouble. The branch sends him a written request to give a certificate of secession or expulsion. He has three months in which to consider it. Should he not forward the required document at the end of that time, he is liable to an action in the High Court in England or Ireland, or the Court of Session in Scotland.

The **result of secession** is absolutely to sever the connection between the branch and the society. The members of the branch are no longer members of the society. They can claim no benefit from its funds, though they may have contributed thereto for years. For my part I should have



thought this so obvious as not to require mention, were it not that there is a case reported of a man who, after seceding along with the rest of his branch from the main body of a friendly society, made a claim for benefit from the parent society, and when the society declined to pay, he brought an action. He did not win; for it would have been absurd to allow him to clear out of the society bag and baggage and then to receive the same benefits as a loyal member.

A branch that has seceded or been expelled from a society must not use the name of that society, or any name implying that it is a branch of the society, or the number by which it was designated as a branch. This is a comparatively new piece of legislation (1895), and the result of it will probably be that a seceding or expelled branch will be obliged to change its name altogether. Of course, this does not apply to cases before 1895. Prior to that date it was nothing uncommon for an expelled or seceding branch to continue to use the old name, slightly altered. Thus: when the Sheffield branch of the Ancient Order of Druids seceded from the Order, it continued to call itself the "Sheffield Branch of the Order of Druids." In future this kind of thing will not be allowed, on the principle that such a name is calculated to cause the unwary to assume that the new society is a branch of the Order of Druids, whilst, in fact, it is not.

**Contributions by one society to another** are allowed by law, provided that the rules of the contributing society authorise the contribution. If there is no rule on the subject, one friendly society cannot contribute to the funds of another. The mere fact of such a contribution does not make the contributing society a branch of the body to which it contributes.

This system of contribution especially applies to **medical societies**—that is, societies for affording medical aid to members in case of sickness—"sick clubs," I believe, is the popular name for them. It very often happens, especially in a comparatively small town, that there are many branches of friendly societies—Foresters, Oddfellows, Druids, and so on—but no branch is large enough to be able to afford to pay for the exclusive services of a doctor to attend on sick members. In that case the best plan is to establish a separate Medical Friendly Society, to which all the friendly societies in the town contribute, and by virtue of the contribution all the members of each contributing society become entitled to the benefits of the Medical Society. I should also say that by section 22 (sub-section 2) of the Friendly Societies Act, 1896, registered trade unions have the privilege of contributing to a medical friendly society, and so securing the benefits for their members. So that in even a small town it ought always to be easy to establish an efficient "sick club" by the combined efforts of the local branches of friendly societies and trade unions. I say "efficient," because it is obvious that unless the doctor or doctors engaged be well paid they will not be likely to do much good. Moreover, you cannot get a good man for the price of a middling one.

One thing more is to be said about medical friendly clubs. If any society, or union, or branch agrees to belong to such a club, it cannot withdraw its subscription except on **three months' notice of withdrawal**, and on paying

up all arrears of contribution up to the end of the three months. The Statute does not require the notice to be in writing; but I strongly recommend that it should be so given. Then you fix the date as well as the precise terms of the notice.

I may add in this connection that it is lawful for a friendly society or branch to contribute by donation or annual subscription to any **hospital or infirmary**, so as to insure the benefits thereof to members and their families according to the rules of the institution. Most hospitals and infirmaries make it a rule to give to subscribers and donors a number of tickets of recommendation, and it may be very useful for a friendly society to be able, practically as of right, to send a number of its members to the hospital for treatment.

The **trustees** are most important factors in every friendly society. By section 25 of the Act every society (and branch, when the branch is separately registered, *see* p. 791) must have **one or more** trustees. For my part, I should never recommend one, and for this reason: the trustee has standing in his name all the property of the society or branch. Thus, if money belonging to the society is invested, it is invested in the name of the trustees. If land is purchased, it is purchased in the name of the trustees. And though, as between the society and the trustees, the trustees have no right to deal with such property except under the rules and for the benefit of the society, yet as regards outsiders the trustees are looked upon as the owners of the property. This fact, of course, gives the trustees the power to dispose of the property as if it were their own, and although they are strictly accountable to the society for the proceeds, it is quite possible the society may be unable to get the money.

The kind of case I mean is this: Phloril is sole trustee of the Butchers' and Bakers' Friendly Society. The Society has been fortunate: trade has been good, so that few members have been in receipt of unemployed benefit; the season has been healthy, so that few have been on the sick list. And so there has been a good surplus, which has been handed over to the trustee for investment. He invests it (say) in the purchase of Consols. Then Mr. Phloril suffers business reverses. He thinks that with the aid of a few hundreds for a week or two he can manage to come out all right. And he "borrows" the society's funds to the extent of £500, intending, no doubt, to repay it practically at once. Nothing is easier. The Consols stand in his own name. The person to whom he sells cannot tell but that the stock is Phloril's private property. And so the unhappy man appropriates the money to his own use; tries, perhaps, to recoup his losses by speculation; loses, and then, finding himself hopelessly insolvent, either files his petition or flies the country. He can, it is true, be prosecuted and sent to gaol; but that will not give the society its money back.

I think this description, which is not by any means a fancy picture, sufficiently shows the idiocy of having a single trustee. You are placing temptation in his way. Now, if you have two trustees it is much safer and better. All funds are invested in the name of both of them and cannot be touched without the



consent of both ; rendering it practically impossible for any fraud to be practised without collusion between the two.

**How trustees are appointed.**—The Act expressly makes provision for keeping the trustees the officers of the society, as distinguished from the nominees of the committee. "The trustees *shall* be appointed at a meeting of the society or branch, and by a resolution of a majority of the members present and entitled to [vote." In some societies the whole body of members do not meet ; but each branch or district elects delegates to represent it at the society's meetings. In such cases the meeting of delegates elects the trustees. A copy of the resolution is to be sent to the Registrar, signed by the newly-appointed trustee and by the secretary of the society or branch.

Any rule of any society providing any other way of appointing trustees is invalid. It is convenient, therefore, to have at least three trustees ; because if you have only two and one of them dies, any funds newly invested must be put into the name of the surviving trustee alone until a meeting of the members can be called to elect a colleague.

**Who may be appointed?** Anyone over the age of twenty-one, except the secretary or treasurer. In order to insure against money being under the control of one man, the Act prohibits the secretary or treasurer of a society or branch from being a trustee of that society or branch. Apparently, there is nothing to prevent the secretary of the society from being the treasurer of a branch, or *vice versâ*. Analogous to the case of a trade union (*see* p. 770) is the privilege conferred on friendly societies of having **stock transferred to new trustees** by an inexpensive process not available in the case of private persons. If a trustee is (a) absent from the British Islands ; (b) bankrupt, or has made an arrangement with his creditors ; (c) becomes lunatic ; (d) is dead ; (e) has been removed from his office of trustee ; or (f) if it is unknown whether such person is living or dead, and there are funds invested in that trustee's name standing in the books of the Bank of England or Ireland, the following steps should be taken. Write to the chief Registrar (*i.e.* the one in London), telling him the facts. Send him proof in support of your statement, and ask him to order the transfer of the stock into the names of the present trustees of the society (or branch). The application must be signed by the secretary and three members. On being satisfied of the propriety of the application, the Registrar will order the surviving or continuing trustees to transfer the stock to the new trustees. If this cannot be done, the chief Registrar may direct that it shall be done by the accountant-general or deputy- or assistant-accountant-general of the Bank.

The **investment of funds** is in the hands of the committee and the members in meeting assembled. For the trustees can only invest with the consent of the committee or of a majority of the members (or delegates, *see* above) present and entitled to vote at a general meeting. The **investments allowed** are (a) in the Post Office Savings Bank. By the Post Office regulations Friendly Societies are allowed to deposit any amount of money in the Post Office Savings Bank. (b) In any savings bank certified under the Trustee Savings Bank Act, 1863. (c) Public funds. (d) The purchase of land or the erection

of offices or other buildings thereon. A benevolent society (p. 786) cannot hold more than one acre of land.

There is another way of investing money—namely, with the National Debt Commissioners. The money, which is to be paid to “the account of the National Debt Commissioners—The Fund for Friendly Societies” at the Bank of England or Bank of Ireland, must be at least £50. At least two trustees must declare that the money belongs exclusively to the society or branch; a false declaration forfeits the money. The cashier at the Bank gives a receipt entitling the society or branch to interest at the following rates:—

When society or branch legally was established before July 28, 1828, and had invested funds with the Commissioners before July 23, 1855, a rate of interest in respect of any assurance made before August 15, 1850, of ... ..	3d. per cent. per day=about 4½ per cent. per annum.
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*Note.*—That is to say, if a man insured his life, or any other benefit, before August 15, 1850, and the society has paid into the above fund money to cover this insurance, the threepenny rate applies as far as this particular ancient insurance is concerned. When all the members who joined before August 15, 1850, are dead or have resigned, the threepenny rate ceases.

When the society or branch was legally established after July 28, 1828, but before August 15, 1850, and had invested funds with the Commissioners before July 23, 1855, in respect of all assurances made before August 15, 1850 ... ..	2½d. per cent. per day=about 3½ per cent. per annum.
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*See note above.*

When the society or branch was established after August 15, 1850, and before June 28, 1888, which had invested funds, as above, before January 1, 1896, in respect of assurance made on or before June 28, 1888 ... ..	2d. per cent. per day=about 3 per cent. per annum.
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In any other case ... ..	£2 15s. per cent. per annum.
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**Vesting of property in new trustees.**—Whenever new trustees are appointed, the property of the society vests in them without any formal transfer or assignment. This is a most important privilege conferred on Friendly Societies, as it saves a very great deal of trouble and expense. To show you how it works: Jones, Smith, and Tomson are trustees of a society. They hold on its behalf (a) an office, held on a lease of ninety years; (b) ten acres of freehold land, built on; (c) £1,000 in the P. O. Savings Bank; (d) £1,000 Midland Railway Stock; (e) £5,000 Consols, or other public (Government) stock. Jones dies or resigns, leaving Smith and Tomson. All the property except (e)—the money invested in the public funds—becomes vested in Smith and Tomson; and if Richards is appointed in Jones's place, the property becomes invested in Smith, Tomson, and Richards. The money (e) invested in public stocks must be transferred as indicated on page 794.

Suppose all three trustees die, Tomson being the last survivor, without any new trustees being appointed, the property vests in Tomson's executor or



administrator as trustee for the society; but on new trustees being appointed, they take all the property (except (c) as aforesaid) merely by the fact of appointment.

As a precaution against loss through defalcations by an officer of the society, **every officer in charge or receipt of money may be required to give a fidelity guarantee.** The guarantee may be that of a guarantee society or of a private person. Before any such security can be demanded from an officer, the rules of the society or branch must require the guarantee. And it is most important to insert in the rules of every Friendly Society a provision that the secretary, treasurer, and collectors shall be required to give security to the society that he or they will render an account whenever required to do so, and will pay over at once any sum found due.

And the rule should also provide that the guarantee shall be given in every case before the officer enters on his duties.

**A shaky officer.**—Then if there is the least suspicion of such an officer's integrity, the Act prescribes the following line to be taken:—

(1) Serve him with a written notice, which is to be left at his last or usual place of residence, requiring him to give in his accounts to the society, or the branch (*i.e.* a meeting of members), or to the committee or the trustees.

(2) If he does not deliver an account, take out a summons in the County Court or before the nearest magistrates (or Sheriff's Court in Scotland) against the person or society who guaranteed his honesty.

(3) If he does deliver the account and money is found to be due, serve him with a written notice to pay it.

(4) If he does not pay, take out a summons, as before, against his guarantor.

There is no need at all to give any notice to an officer to render his accounts at the times the rules require him to do so. Thus, if the rules say that the treasurer of a branch shall render an account every week to the committee at their weekly meeting, and one week the treasurer does not appear or, appearing, does not account, a summons can be applied for at once. The rules given above apply to other occasions.

#### PAYMENTS ON DEATH OF MEMBERS.

When a man dies to whom money is owing, including money payable by way of life insurance, the money has to be paid to his executor or administrator. That is to say, the amount is not payable directly to the next-of-kin, but to the executor, who is to distribute it amongst the next-of-kin. And before the executor or administrator can receive the money, he must "prove" the will; or if there is no will, he must take out letters of administration.

Working men seldom make a will, for the simple reason that they have so little to leave that it is not worth while. And in order to facilitate the work of Friendly Societies, they have been put on a footing of less strict legality than insurance offices.

Members above sixteen years of age have the right of nomination—a most valuable privilege. It is exercised in this wise: A member is entitled to benefit on his death, either funeral benefit or life insurance benefit. He

can, by merely signing a paper and leaving it at the office of the society or branch, or by signing a book kept for that purpose by the society, nominate someone to receive the money on his death. But he cannot nominate for a sum greater than £100. The right of nomination includes any sum deposited or accumulated to your credit in the society's loan fund (if any).

You can **revoke or vary** your nomination as often as you like, provided you do it in writing, signed by you and left at or sent to the society's office, or entered in their book. **Marriage revokes** any nomination previously made, on the same principle that when a man has made a will and afterwards marries, his will becomes of no effect (*see p. 34*).

And **you can nominate** whomsoever you please, except an officer or servant of the society or branch, unless that officer or servant is your husband, wife, father, mother, child, brother, sister, nephew, or niece. To make it clear, if your uncle is one of the officials of the society, you cannot nominate him; though you could do so if he were not an official. But you can nominate your brother, though he is an official.

**When the nominator dies**, the society must pay to the nominee the benefit nominated to him as soon as the nominee has produced a certificate of death from the registrar of deaths. But not more than £100 is to be paid in this fashion. Anything over must be handed to the administrator or executor of the deceased. Up to £100, also, no estate duty has to be paid; but if after deducting the debts and funeral expenses his whole property comes to more than £100, the society can demand from the nominee or other person a statutory declaration that estate duty has been paid.

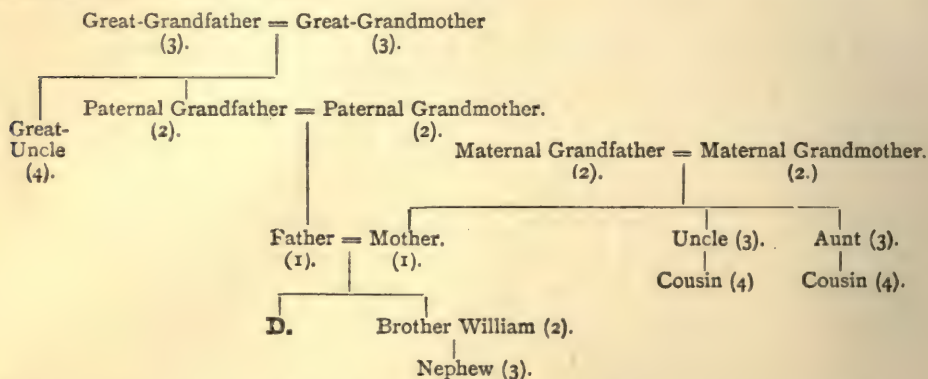
When the member has made **no nomination**, the society must first inquire whether he has left a will or not. If he has, then any benefit due on his death must be made to his executors for them to deal with. On the other hand, he may have left **no will**, and this must always be the case (in England) when he is under twenty-one. Now, if this were the case of an ordinary insurance company and not a Friendly Society, someone on the dead member's behalf would have to take out letters of administration and then demand the money from the trustees of the society to distribute amongst the next-of-kin. But in this case the trustees of the society have the power to distribute the money amongst those entitled to receive it—or, as the Act says (section 58), "amongst such persons as appear to a majority of the trustees, upon such evidence as they may deem satisfactory, to be entitled by law to receive that sum."

In the First Book I showed you how in England and Scotland respectively money is distributable on the death of a husband and father who dies without making a will (pp. 33-35, 56-58). To recapitulate shortly, in England **the wife** is entitled to the whole fund if there are no children and her husband has not left more than £500; if he has left more than £500, she gets £500 and half of anything over. If there are children (or grandchildren), she only has one-third and no £500. **Children** are entitled to all that the widow does not get—equally amongst them. In Scotland the widow always takes one-third, and the children, if any, the rest between them.



The difficulty arises when a man leaves no widow or children. Grandchildren (if any) are first entitled in equal shares. Then (in England) the father, and after him the mother, brothers and sisters. If one brother or sister is dead, his or her children take their parents' share amongst them. In Scotland the mother is preferred before brothers and sisters and their children.

Suppose the deceased member had no parents surviving him and no brothers or sisters, the way to find out who are the next-of-kin is this: Draw out a table, tracing the deceased and the rival claimants up to a common ancestor, and then count every person as a step. The claimant with the fewest steps has the best claim. Thus:—



You see that the grandparents are two degrees of kin removed from D, the deceased—the same as his brother William. But William has the preference. On the other hand, should William be dead, the grandparents are one degree before the nephew, who is three times removed—the same as great-grandparents. A cousin and a great-uncle (4) have equal claims; but they are not equal to an uncle or aunt, nephew or niece, or great-grandparent, who are in the third degree. The figures in the diagram show the degrees of kinship between D and the others.

**Legitimacy** is necessary to establish kinship. Thus, in law, an illegitimate child's natural parents are no relation to it, not even its mother. And, except in the case of Friendly Societies, an illegitimate person's parents, or brothers, or sisters have no claim on his property when he dies—unless, of course, he leaves it to them by will. But it is different in the case of Friendly Society money. Should a member of illegitimate birth die without having made a nomination, and unmarried, the trustees of the society are to pay the money to the persons who would have been entitled if the member had been legitimate—that is, in the first instance to his natural father or mother.

There is one omission from this Act which I cannot help thinking was an oversight. Although the Statute provides for the case of a member of illegitimate birth who dies without leaving any children or widow or nominee, there is no corresponding provision in the case of a member who has been living with a woman as his wife and has had children by her. By strict law, such a woman and such children would not be entitled to a halfpenny, because

they are not the deceased member's legal wife and lawful children. But I would call the attention of trustees to **a little bit of law** that may be very handy in such a case. When a couple have been living together as man and wife, and the woman has been called by the neighbours Mrs. —, and the man has been in the habit of alluding to her as his "missus," the law presumes that they were legally married until the contrary is proved. And trustees are entitled to require the very strongest evidence before they refuse to treat such a person as the wife of the deceased and the children as his lawful children. Take this kind of case:—A member dies, leaving a woman whom he has treated as his wife, and children by her. The member's brothers, or parents, claim his insurance benefit on the ground that he was not a married man. If I were a trustee I should say to these claimants, "Prove your case. I am not going to call on this woman to prove that she was married to the deceased. Apparently she was. You must prove that she was not." And if no conclusive proof were forthcoming, I should not scruple to hand over the money to the woman and the children.

It sometimes happens that trustees **pay the money to the wrong persons**. What then? Are they, or is the society, liable to pay it over again to the right person? By no manner of means. The Act protects trustees of Friendly Societies in a way that is not known in the case of other trustees; for it enacts that if the money is paid to the person whom the majority of trustees think to be entitled, no further claim can be made either on them or on the society. All that the rightful claimant can do is to claim the money from the person to whom it was paid in mistake.

I have known this case: Tom Jones died without having nominated anyone to receive the insurance money from a Friendly Society. His brother Jim claimed as next-of-kin. On inquiry it appeared that Tom had two brothers, Jim and Sam; but Sam had gone away to Australia ten years before and had not been heard of since. The trustees paid the whole benefit to Jim. Then Sam turned up. Sam's only remedy was to sue Jim for half.

Now with reference to **people who disappear**, the law is that a man who has not been heard of by those who would be likely to hear of him, for seven years, is presumed to be dead. But a case happened the other day in which a member of a society had not been heard of for seven years, and his relations claimed the money to which they would have been entitled on his death. The trustees, however, refused to hand it over, and when the relatives took them into Court, the Court upheld the trustees.

**Payment on death of children.**—No society, whether registered or not, is allowed to insure, or pay on the death of a child under **five years** of age, a sum of more than £6. And for a child over five, but **under ten years**, no more than £10 can be insured. In order to avoid evasions of this law against over-insurance on children's lives, the £6 or £10 is fixed as the total sum for which a child may be insured anywhere. That is to say, if a parent has insured the life of a child under five in one society for £5, and in another for £5, he cannot get both sums. He is liable to a fine if he takes more than £6 from the two together.



The society must inquire, before paying any benefit of this kind, whether any sums have been paid by any other society or branch; and, if so, how much. Moreover, the person claiming the money **must produce a death certificate** signed by the local registrar, bearing these words endorsed on it: "to be produced to the ——— Society [or branch] said to be liable for the sum of £——."

This provision does not apply to ordinary life insurance, when the person insuring the life has an "insurable interest" in that life (*see* p. 116).

Hereafter the rules of every Friendly Society must contain and provide for the following things, and no society can be registered unless its rules are in order:—

(1) The name and place of office of the society.

(2) The whole of the objects for which the society is to be established, the purposes for which the funds thereof shall be applicable, the terms of admission of members, the conditions under which any member may become entitled to any benefit assured thereby, and the fines and forfeitures to be imposed on any member, and the consequences of non-payment of any subscription or fine.

(3) The mode of holding meetings and right of voting, and the manner of making, altering, or rescinding rules.

(4) The appointment and removal of a committee of management (by whatever name), of a treasurer and other officers, and of trustees, and in the case of a society with branches, the composition and powers of the central body, and the conditions under which a branch may secede from the society.

(5) The investment of the funds, the keeping of accounts, and the audit of the same once a year at least.

(6) Annual returns to the registrar of the receipts, funds, effects, and expenditure, and numbers of members, of the society.

(7) The inspection of the books of the society by every person having an interest in the funds of the society.

(8) The manner in which disputes shall be settled.

(9) In case of dividing societies, a provision for meeting all claims upon the society existing at the time of division before any such division takes place.

And also in the case of Friendly and Cattle Insurance Societies:—

(10) The keeping separate accounts of all moneys received or paid on account of every particular fund or benefit assured, for which a separate table of contributions payable shall have been adopted, and the keeping separate account of the expenses of management, and of all contributions on account thereof.

(11) Except as to cattle insurance societies, a valuation once at least in every five years of the assets and liabilities of the society, including the estimated risks and contributions.

(12) The voluntary dissolution of the society by consent, in a Friendly Society of not less than five-sixths in value of the members, and of every person for the time being entitled to any benefit from the funds of the society, unless his claim be first satisfied or adequately provided for; and in a Cattle Insurance Society by consent of three-fourths in number of the members.

(13) The right of one-fifth of the total number of members, or of one hundred members in the case of a society of one thousand members and not exceeding ten thousand, or of five hundred members in the case of a society of more than ten thousand members, to apply to the Chief Registrar, or, in case of societies registered and doing business exclusively in Scotland or Ireland, to the assistant-Registrar for Scotland or Ireland, for an investigation of the affairs of the society, or for winding-up the same.

Of course, unless the Friendly Societies Act prohibits it, you can have any number of rules on any other subjects.

I cannot too strongly impress on members and committees of Friendly Societies the important principle that **the rules must be obeyed**. The proposition appears self-evident, and yet how many people try to run counter to it in practice! If the society wants to do anything which its rules do not permit, there is only one thing for you to do, and that is to alter your rules until they do permit of it. To take a case that happens occasionally:—A society consisting of several hundred members has a proposal put before a general meeting. The proposal is clearly beneficial to the society, and all the members except one vote for it. But the rules, on being referred to, do not allow that proposal to be carried into effect. The one member can put his foot down and prevent the vast majority from carrying out their will. The rules must be amended first.

Now, with regard to the **amendment of rules**, I would have you remember two things, namely—(1) All amendments must be made in proper form according to the rules of the society; (2) No amendment is valid—that is to say, no amended rule can be acted upon until the amendment has been registered with the Registrar (Scotland and Ireland, assistant-Registrar) of Friendly Societies. I recommend every society to have a rule to this effect: “No rule shall be amended except at a general meeting. The notice convening the meeting must state specifically any amendment of rules proposed to be made. No amendment shall be allowed unless it is carried by a three-fifths majority of the persons present and entitled to vote at the meeting.”

**The rights of members.**—Every member has the right to have a copy of the rules for a shilling, whenever he demands one. And he has the right to a free copy of the last annual return and balance-sheet (p. 790), and to inspect the books at the registered office at all reasonable hours. But, unless he is an officer of the society, or is authorised by a special resolution of the members, he cannot inspect another member's loan account without his leave.

No one is entitled to have a greater benefit than £200 in gross from Friendly Societies, or more than £50 in annuities; and any society may compel a member to sign a declaration on oath that he is not receiving more than these sums. But the rules may provide that when a member's contributions exceed the maximum sum allowed by the Act, he is to be allowed to accumulate the surplus at interest, and can withdraw the surplus and accumulations when he wants them.

**Militiamen and volunteers** are specially favoured. It is illegal to make a man forfeit his interest in a Friendly Society because he becomes one of those gallant defenders of his country. Nor must he be fined for non-attendance at a meeting if his commanding officer certifies that his absence was caused by the discharge of his military or naval duties.

**Disputes.**—It is Dr. Watts, I believe, who assures us that birds in their little nests agree—a statement which displays a remarkable lack of acquaintance with the manners and customs of the London house-sparrow. But be this as it may, members of Friendly Societies do not by any means always agree. Wherefore, in order to prevent the money of these societies from being wasted in legal expenses, it has been found necessary to make stringent rules in the Friendly Societies Act as to the determination of matters in controversy. The dispute may be between the society, or branch, or an officer thereof, and



(a) a member or person claiming through him (*e.g.* the nominee or next-of-kin); for instance, a dispute between the trustees and the wife of the deceased member as to funeral benefit. Or the dispute may arise over

(b) an expelled member, or one who has resigned or dropped out of the society, provided that he has not ceased to be a member for more than six months.

Another class of dispute is between a society and a registered branch. A fourth class is between an officer of a registered branch and the society. A fifth kind is between two or more branches, or the officers of these branches.

**How disputes are dealt with.**—When any controversy arises, the first thing to do is to look at the rules of the society or branch, as the case may be, and see if there are any rules dealing with the settlement of disputes. All societies—except, perhaps, a few very old ones—have rules on this subject. Since 1875 no society has been allowed to be registered unless its rules do provide a method to accomplish this object. Having found your rule, you must follow it, and when a decision has been given by the person or persons whom the rules appoint, there is **no appeal**—absolutely none. A great many societies make the committee the final arbiters in all disputes. For my part, I consider such a practice reprehensible, because as a rule the dispute is between the committee and a member, and it is absurd to make one of the parties to the disagreement the judge of the cause. It is a much more sensible rule to provide for arbitration by two arbitrators and an umpire. When the committee has to appoint an arbitrator to act for the society, it must not appoint a member of the society, because he has an interest in the decision, and is unable to be impartial. When the decision has been given according to the rules, if either party to the dispute refuses to do what he has been ordered to do, the other party can apply to the County Court (England and Ireland) or Sheriff's Court (Scotland) to enforce the decision.

The rules of some societies and branches—mostly very old ones—direct that all disputes shall be **referred to justices**—that is, Justices of the Peace. The parties can, however, consent to have the matter settled in the County (or Sheriff's) Court instead, if they please.

Now, it sometimes happens that disputes arise on very complicated questions, in which the parties seem well matched. One side appears to have one rule in his favour, the other party has an apparently equal right under another rule. Or the case may be one not provided for either by the Friendly Societies Act or by the rules of the particular society or branch. Or, again, the dispute may be one involving an important principle upon which the society would like to have an authoritative pronouncement by someone whose decision will be given from the standpoint of extensive knowledge and vast experience. In such a case, unless the rules of the society or branch expressly forbid it, the parties to the dispute may consent to have it **referred to the Chief Registrar**, or—in Scotland or Ireland—to the assistant-Registrar for that country. The Registrar applied to must first obtain the consent of the Treasury, and can then proceed to hear and decide the matter in dispute. He has the power to administer an oath to all witnesses; may compel all parties interested

to appear before him, and order all books and documents relating to the case to be produced. His decision is final.

There are some societies whose **rules contain no direction** as to settlement of disputes. These are very old societies, and are few and far between. The law is that the disputes of such associations are to be determined by the local County Court (in Scotland, the Sheriff's Court of the county.)

Again, it may, and does, happen that a member who has a dispute with his society, or a branch which quarrels with the parent body, applies to have a dispute settled according to the rules; but **no decision is come to on the matter**. For instance, the rules provide that all disputes shall be heard and determined by a person to be appointed by the trustees. A member claims sick benefit, and is refused. He applies to have his right determined according to the rules, but the trustees refuse to appoint anyone to decide the dispute. The member must wait forty days, and if the matter is not then settled, he has the right to apply to the County (or Sheriff's) Court for a decision.

As I have said, a decision by the person or persons appointed under the rules, or by the Registrar, or the County Court judge or Sheriff, is final. But sometimes an important point of law crops up, upon which all parties would like to have a decision by her Majesty's judges. In such a case, the person originally deciding the case may, but is not compellable to, "state a case" for the opinion of the High Court in England and Ireland, or the Court of Session in Scotland. This should only be done when the matter is one of great importance, involving some legal principle.

**Loans to members** are permissible in certain circumstances.

(1) *A society* may advance to any member of a full year's standing any sum not exceeding half of the amount of an insurance on his life. But the society must take security in writing from the borrower and two satisfactory sureties for repayment. The amount advanced, with interest, may be deducted from the insurance, but so as to leave unimpaired the right to take proceedings against the sureties.

*A registered branch* may lend in the same way, subject to the rules of the society.

(2) Some societies have **loan funds**, and this is quite legal and proper. Out of such a fund a society may make loans without any security. It is to be borne in mind, however, that a loan fund must be kept entirely separate from the other funds of the society, and no loan must be made [except as in case (1)] out of any fund but the separate loan fund. A member must not have an interest of over £200 in a loan fund, nor must any loan be made of more than £50. If a member applies for a loan, and he already owes money to the society, it is illegal to lend him more than the amount which, added to his debt, will make up £50. All this, again, is subject to the society's rules, though the rules cannot fix a greater amount than the Act allows. Further, it is illegal for any society to hold on deposit from its members any amount beyond what is fixed by the rules and the rules even cannot fix more



than two-thirds of the total sums owing to the society by the members who have borrowed from the loan fund. That is, suppose loans have been made to the extent of £30,000 at 4 per cent. interest; some has been repaid, leaving £24,000 principal and interest. The society cannot receive deposits from members into the loan fund amounting to more than £16,000. This is to leave a substantial margin for bad debts.

**Collecting Societies** are under special rules by the Collecting Societies and Industrial Assurance Companies Act, 1896. A "Collecting" Friendly Society is one which receives contributions by means of collectors at a greater distance than ten miles from the registered office. Anyone becoming a member of such a society must have delivered to him a copy of the rules at a price of not more than one penny, and a copy of a printed policy, signed by the secretary and two of the committee, for another penny.

**No forfeiture** of any benefit can take place until fourteen days' notice in writing has been given, specifying the amount of contributions in arrear, naming a time and place for payment, and expressly notifying the fact that a forfeiture will take place unless the arrears are paid.

**Collectors** are absolutely prohibited under a penalty from serving on the committee, from holding any office except that of superintendent collector, and from voting or taking any part in the proceedings of any meeting of the society. These rules have been made stringent in order to put down that class of society which existed principally, if not wholly, for the benefit of the collectors. And in order to put a stop to dishonesty, it has been made a penal offence, subjecting the offender to a fine of £50, for any one wilfully to make or order to be made, or even allow to be made, any alteration or erasure in or omission from a contribution or collecting-book.

**Protection of members.**—Every collecting society must hold an annual meeting, which must be advertised at least twice in at least two newspapers in every county where the society carries on business. The last of these advertisements must appear not less than fourteen days before the day fixed for the meeting. A notice must be affixed in a conspicuous place inside or outside every office of the society during these fourteen days.

For at least seven days before the meeting, every **balance-sheet** of the society must be kept open for inspection at every office where business is carried on. Any member who requires a copy is entitled to have one sent by post. In the matter of **auditing the accounts**, members of Collecting Societies are better protected than members of ordinary Friendly Societies. As I have shown (p. 790), any dufer may be appointed auditor of a Friendly Society; but no one can audit the accounts of a Collecting Society unless he is a man who publicly carries on the business of an accountant. Societies of this kind have to make the same kind of annual returns as Friendly Societies (p. 790), under like penalties. These returns must be vouched by an accountant auditor; otherwise they are to be deemed as not having been made at all.

**In the matter of disputes**, also, the Collecting Societies Act is very different from the Friendly Societies Act. So far from a member of a Collecting Society being bound to have his disputes with the society settled according

to the rules thereof, he may, notwithstanding anything to the contrary in those rules, insist on having every matter in dispute decided by the magistrates, or the County Court (Sheriff, in Scotland).

Finally, I would have you observe that the Collecting Societies Act applies to **unregistered** as well as registered societies.

The Statute also applies to Industrial Insurance Companies which collect premiums at less periodical intervals than two months.

### SECTION III.

#### WAGES.

**Payment of wages in public-houses—Payment by weight in collieries—Deductions for slack, waste, and small coal—The Truck Acts—Wages must be paid in coin—Payment must not be in kind—Deductions for materials supplied—Master must not charge workman more than cost price of materials—Nor more than reasonable price for standing-room or other accommodation—Fines on workmen—Must be by agreement—Must be reasonable—The workman's remedy—Contracts as to spending of wages illegal—Watch clubs—Foreman liable for compelling man to join a watch club—Goods supplied on credit by master, foreman, etc.—Order for goods, price to be deducted from wages, is illegal—Medical attendance—Rent—Food prepared and consumed on the premises—No interest to be charged on advance of wages—Men entitled to advance in some cases—Compulsory contribution to benefit societies—What workmen are entitled to benefit of the Truck Acts—Hosiers and agricultural labourers: special rules—Piece-work—Is an employer bound to find work?—Breach of contract—Forfeiture of wages on dismissal for misconduct—Settlement of wage disputes and breaches of contract.**

THE law is very tender on the subject of workmen's wages. Until modern times it was very severe. Kings and Parliaments, acting on the exceedingly good principle that it is neither good for the State nor for the individual that any man should be idle—seeing that, unless he has independent means, he must either support himself, or else be a burden on others—attempted to uproot idleness by the strong hand of the law. And so we find on the Statute Roll of England ordinance after ordinance condemning to severest pains and penalties all "masterless men." "Common people" who refused work when it was offered them might be whipped and imprisoned. And in order that there might be no dispute on the wages question, a statutory rate of wages was imposed from time to time. Needless to say, these laws were more frequently broken than observed. Men refused to be told by Parliament how much—or rather how little—their wages were to be; and so these early Statutes of labourers were treated in the same way as the Sumptuary Laws by which those in authority tried to curtail the use of costly apparel.

As has been stated in the preamble to the chapter on Trade Unions, the introduction of machinery, and the substitution of the limited company for the private master who knew his men, have brought about vast changes in the relations between employer and employed. If the power of organised labour has increased, so has the power of capital; for it is only within about the last century that we find in one pair of hands such enormous sums of money as



are now required to carry on great industrial concerns. And it is in this century that we find Acts of Parliament passed to secure to workmen the fruits of their labour—the Truck Acts, the Coal Mines Regulation Acts, the Employers and Workmen Acts, and others.

A full definition of what is meant in law by a “workman” is given on page 813. The term comprises all people who make their living by manual labour, except domestic and menial servants and seamen. Clerks, shopmen, and such people as bus conductors do not come within the definition, because they do not gain a livelihood by manual labour.

**Payment of wages in public-houses** is prohibited by law under a penalty of £10 for each offence on conviction before two magistrates (or a stipendiary) or, in Scotland, before the sheriff. A public-house includes a beershop, or any place for the sale of spirits, wine, cider, or other spirituous or fermented liquor; and it also includes any office, garden, or place occupied with such an establishment, or belonging thereto. The object of the Act is plain. You cannot very well pass an Act to prevent a workman from going into a public-house after he has received his wages, but you can see that he is not compelled to receive his pay with the fumes of liquor under his very nose.

The above penalty is inflicted on “any person who contravenes, or fails to comply with, or permits any person to contravene” the provisions of the Statute. You may therefore have, and hold liable, the actual employer, any foreman or clerk who, in fact, pays the workman, and the publican himself. The master is always liable unless he proves that he did all in his power to prevent the violation of the law. In the case of collieries, the owner, agent, or manager is liable unless he proves that he has done everything possible to carry out the Act and to see that it is carried out.

**Payment by weight in collieries.**—It is the rule in coal-mines to pay all the miners by weight—so much per ton of coal won and sent to the pit’s mouth. When a miner has, by his pick and shovel, cut out of the bowels of the earth a quantity of coal, he shovels it into a sort of tub on wheels. The tub is then run along a tram-line by a boy as far as the shaft, and is hauled up to the pit’s mouth, where it is weighed by a person employed by the mine-owner, whose weighing is checked by another person appointed by the men, called “the checkweigher.” In order to identify the miner who has sent up the coal, every man is furnished with metal tickets, called in some districts “motties,” bearing a number; and when a man fills a tub, he puts a motty on the top to inform the weigher whose coal it is he is weighing.

It does not require much intelligence to perceive how extremely easy it would be for the persons at the mouth of the pit to cheat the man below, who, from the nature of the employment, cannot be present when his coal is weighed. Accordingly, a stiff penalty has been imposed on anyone who cheats or tries to cheat a coal-miner by paying him for a less weight than he has actually gotten. “Those persons (*i.e.* the miners) shall be paid according to the actual weight gotten by them of the mineral contracted to be gotten; and the mineral gotten shall be truly weighed at a place as near to the pit’s mouth as is reasonably practicable.”

**Deductions for slack or small coal.**—As readers may well imagine, along with “the mineral contracted to be gotten”—that is to say, the coal which he is hired to get—the miner not infrequently sends up a good deal of rubbish. I have myself seen a tub arrive at the pit’s mouth containing a greater weight of stones than of coal. The owner of the pit is by no means bound to pay for this. But the matter must not be left to be settled day by day, or tubful by tubful. The owner or manager must make a contract with the pitman as to deductions “in respect of stones, or substances other than the mineral contracted to be gotten”; or of tubs improperly filled by the miner, his drawer (*i.e.* the person who carries his tubs to and from the shaft), or the person immediately employed by him. The deductions can only be made as per the agreement.

Now, there was a point long in dispute between masters and men as to deductions for “slack,” or “small coal”—a term well understood, I should suppose, by every thrifty housewife. Finally, in 1889, a case was taken to the House of Lords on the point; and the highest tribunal in the land decided that “slack,” being coal of a kind, though small, is nevertheless coal. It is, therefore, “mineral contracted to be gotten” by a coal-miner. Wherefore it follows that deductions for “slack” are illegal, because the Act only permits deductions for “stones or substances not contracted to be gotten.” It is, nevertheless, quite lawful for the employer to agree to pay a different rate for “slack” from what he pays for lumps of the black diamond. The thing he must not do is to ignore it altogether and pay nothing for it.

#### DEDUCTIONS FROM WAGES, FINES, AND PAYMENT FOR MATERIALS

The first **Truck Act** (1831) was passed to put a stop to a practice that had grown up in many manufacturing districts of defrauding workmen of the wages of their industry in two ways. The first way was by paying wages in kind. The second was by compelling the workman to spend his money in particular ways or at shops kept by particular persons. Thus, it was a common thing for a man to be employed upon the terms of receiving so many shillings a week, so much coal, so much beef, and so on. Another way of doing it was to compel the workman to agree that he and his family would only deal at a certain shop, kept by a foreman or by some agent of the employer; any debts incurred at this shop to be stopped out of the workman’s wages.

It was considered by Parliament that dealings of this kind were injurious to workmen, for several reasons. In the first place, a workman who received part of his wages in goods instead of money derived no advantage from trade competition. In the second place, he had no choice in the quality of the goods supplied. The same argument applied where the workman was bound to deal at a particular shop. Again, a workman compelled to buy his household necessities at the foreman’s shop was almost invariably overcharged, and was encouraged to buy more than he could afford. It is not too much to say that the Truck Act of 1831 is one of the most beneficent measures ever placed upon the Statute Roll.



Contracts for the hiring of workmen are now illegal, null and void, unless the **wages are made payable in the current coin of the realm.** Moreover, all payments of wages to workmen must be made in coin, and not otherwise. It used to be thought that this Act meant that, if an employer deducted anything from his workman's wages on any account whatever, it was an offence against the Truck Act. But this is not so. The Act of 1831 merely provides that all wages that are paid shall be paid in coin—not that all wages agreed to be paid shall be paid.

Thus, an employer could **deduct from the wages the price of materials** supplied to the workman for his work. What he must not do is to give the workman as the price of his work a reward in kind instead of in money. To take an instance:—A joiner agrees to do a day's work for five shillings, a hammer, and a saw, which are to be reckoned as worth another five shillings. He does the work, and receives the money and the articles mentioned. The position is this:—The joiner can sue for and recover another five shillings. He can hold fast to the hammer and saw to boot, because they having been given to him in pursuance of an illegal contract, the employer could not bring an action to have them returned without relying on his own illegal act. His case would be, in fact: "I illegally gave this man a saw and a hammer. I now want them back." To such a plea no Court will listen. Beyond this, the master has broken the Truck Act in a way that renders him **liable to a fine.** If it is his first offence, he may be mulct in a sum not exceeding £10; for the second offence, not more than £20, nor less than £10; and for a third or subsequent offence, any sum not exceeding £100, at the discretion of the Court. Not only was it an offence to pay the workman in the way described, but it was an offence even to make the contract to pay him in that way.

In the instance just given, the saw and hammer were given to the joiner as part of his wages. Now let us suppose that the agreement was this:—"You [the joiner] shall build me a dove-cot for £4. I will supply the wood at 2d. a foot, and the nails at 10d. a pound, to be deducted from the £4." This contract would not be within the Truck Act, 1831, because the wood and nails supplied by the employer are not part of the workman's wages, but are materials supplied to enable him to do his work. The law continued for a long time in this state; but at last, in 1896, a new Truck Act dealt with the cases of employers who supplied their workpeople with materials to be used in the work at prices that were frequently so exorbitant as to be absurd.

The law in respect of **materials supplied at excessive prices** now stands thus:—No employer can ask a workman for payment for material supplied, nor for the use of tools, machinery, light, heat, standing-room, or anything done by the employer, unless there is either—

- (a) *A contract, the terms of which are posted up in the workshop; or else*
- (b) *A contract in writing (printing is included), signed by the workman; and*
- (c) *The sum charged or to be deducted must be reasonable, and in the case of materials or tools supplied to the workman, must not exceed the cost price to the master; and*

(d) Whenever a charge or deduction is made, the employer must give the workman *written particulars* of the same on each and every occasion.

I think I shall best show you **what this section of the Statute means** by telling you what it does not mean.

It does not mean that an employer can, by simply putting up a notice to that effect in the workshop, or factory, or other place of employment, meet the terms of the Statute. A notice like this: "A charge of — will be made for standing-room," is of no validity whatever. To entitle the employer to make such a charge against any workman, he must have made a contract to that effect with that particular workman. A contract (*see Book III., Chap. I., sect. i., p. 245*) requires the free consent of both parties, which consent must be expressed either by words, writing, or conduct. Silence alone does not give consent. There must be, first, a contract between employer and employed, by which the latter consents to pay for materials or accommodation; and, in addition, a notice always kept posted up containing the terms of the contract. I elaborate this at length because I have heard of people who imagine that an employer can, under the Truck Act, 1896, make any deductions he pleases for materials and the like, so long as he puts up a notice. As stated above, this is a great mistake.

In the next place, the Statute does not mean that there is to be a written contract signed by the workman and a notice as well.

And, last of all, comes the important part of the section, limiting the master's rate of charge. Amongst the persons sought to be protected by this section are sempstresses, who take work home to be done. This class is largely in the hands of the sweater, who, before this Act, would give a woman a dozen pairs of trousers to sew, paying her at the munificent rate of two shillings a dozen, and compelling her to buy her thread from him at his own price.

On this point the Act is clear. An employer cannot charge an employee for materials more than the amount which those materials cost him (the employer). He is not allowed any profit whatsoever.

And in respect of charges for the use of tools, for standing-room, heat, light, and the like, he cannot ask more than a reasonable sum.

If an employer breaks this section, he is liable to be fined for a breach of the Truck Act (as on p. 808). Thus, if he charges more than cost price for material, he is liable. If he charges more than a reasonable amount for the use of tools, etc., he is liable. If he makes a contract by which the workman agrees to allow him to charge or deduct from wages more than the cost price of material, or more than a reasonable sum for use of tools, heat, light, and the like, he is liable, even though the contract has never been acted on.

The Truck Act, 1896, also contains a provision, previously noticed in dealing with shopkeepers' assistants, with regard to **Fines on Workmen** (*see p. 680*). The essence of this section is that no fine can be imposed except (a) for a specified offence, of which the employer must give particulars in writing; (b) the offence must be one which causes, or is likely to cause harm, to the employer's business; (c) there must be a contract with the workman, either



written and signed, or else embodied in the terms of a notice ; (d) the fines must be reasonable.

Here, again, let me remark that this Act **does not give the employer any greater rights** than he had before, but rather less. For instance, before the Act, suppose a workman had come late, or something of that kind, and the employer on pay-day said, "Smith, here are your wages ; but I shall fine you sixpence for being late on Thursday." And if Smith, as he very likely would, took his wages *minus* the sixpence, he would be held to have assented. But now, no employer could levy any such fine unless some previous contract existed by which Smith had consented to pay a fine for late attendance. And on top of this, the fine would have to be reasonable in the circumstances of the case.

The whole idea of the Act is that fines shall not be arbitrary, or in the discretion of the master.

If any employer induces his workmen to agree to a scale of fines that are not reasonable, it is an offence under the Truck Act, although no one has been fined. Still more, of course, is it an offence to inflict a fine that is unreasonable ; and more still to inflict a fine without a previous contract with the workman.

**A workman** who has been illegally or unreasonably fined, or has been illegally or unreasonably charged for materials, use of tools, etc., **has six months in which to recover the amount.** If at the time he acquiesced in the deduction from his wages, he can only recover from the master the unreasonable excess. But if he protested at the time, he can recover every penny that was deducted or paid, even though the fine or charge for materials, etc., was reasonable in itself.

A further and **most important** provision is as follows :—

That if in any contract hereafter to be made between any artificer and his employer, any provision shall be made directly or indirectly respecting the place where, or the manner in which, or the person or persons with whom, the whole or any part of the wages due or to become due to any such artificer shall be laid out or expended, such contract shall be and is hereby declared illegal, null, and void.

And an employer who makes such a contract is liable to a penalty under the Act. The above provision has been supplemented by section 6 of the Truck Act of 1887, which makes it an offence for any employer, either by himself or his agent, directly or indirectly, to impose any condition as to how or with whom any wages are to be expended. It is also an offence for the employer or his agent to dismiss any workman on account of the place at which, or the manner in which, or the person with whom any part of the wages is expended or not expended.

This section is aimed at **watch clubs**, and bodies of that character. It is by no means an uncommon thing for a foreman to constitute himself the agent of a man who supplies watches, chains, and even bicycles. The *modus operandi* is this : The foreman starts a watch club amongst the men, who are to pay so much a week by way of instalment for a watch. The foreman undertakes to collect each man's subscription on pay-day, and he receives for his trouble a liberal commission from the merchant. Complaints have frequently been made that the foreman, in order to add to his income in the way described, practically

compels the men under him to join his club. Many a workman knows well the difference between the treatment meted out to the members of the watch club and that accorded to non-members. It cannot be too widely known that it is illegal for any foreman, or other person in a position of authority, to procure the dismissal of a workman because the man refuses to buy goods from him. Let me recommend you, if your foreman pesters you to purchase from him watches that you do not want, and behaves unpleasantly to you when you refuse, to pay a quiet visit to the local factory inspector. Tell that officer the facts of the case; bind him to secrecy as to your identity; and he will find a way of hinting to the enterprising foreman that unless he is careful he will be hauled up before the magistrate. I have often wondered that the unions do not take up this question. By the timely prosecution of a few watch-club agents, they could very soon put a stop to the iniquitous system by which men are compelled to purchase peace and quietness and permanency of employment by buying trumpery watches, rickety bicycles, and fancy chains at exorbitant prices.

By the operation of section 6 of the Truck Act, 1831, an employer is not entitled to recover from a workman the price of any goods sold to him by the employer, or supplied from any shop in which the employer has a share or interest. In the term "employer" are included all masters, bailiffs, foremen, managers, clerks, and other persons, who hire or superintend the men. It therefore comes to this, that although a workman, after he has received his wages in cash, is at liberty to deal at a shop kept by a foreman, clerk, manager, or master, the transaction must be for cash. If **goods are supplied on credit**, the foreman, clerk, manager, or master has no legal remedy for the price. Moreover, if the workman sues for his wages, the employer cannot deduct the price of goods so supplied on credit. Carefully bear in mind that this section does not refer to any contract or understanding whereby the workman agrees beforehand that he will deal at such and such a shop (*see* p. 810).

To complete the legislation on this subject, the Truck Act, 1887 (section 5), enacted that an **order for goods**, the price of which was to be deducted from wages, was valueless. Thus, if an "employer" (*see* last paragraph) or his agent obtains the consent of a workman that he (the employer) shall order goods for the workman, the person who supplies the goods on the employer's order cannot sue the workman for the price, nor may the employer pay the seller of the goods and deduct the price from the workman's wages. Suppose, for instance, a foreman acts as agent for a jeweller, and he obtains from one of the men under him an order for a watch and chain, to be supplied to the workman on credit and paid for by instalments. After the man has got his watch and chain he need not pay for it. At all events, the jeweller cannot make him pay, because the order came through the foreman, who is an "employer" within the meaning of the Act.

The law is, then, that **a workman shall receive his wages in full and in cash**, subject to reasonable deductions for fines and for materials supplied; and that he shall not be cajoled or coerced by his employers or those in authority over him into spending those wages this way or that. But to this rule there



are a few exceptions made by section 23 of the Truck Act of 1831. This is the section, and it speaks for itself:—

Nothing herein contained shall extend or be construed to extend to prevent any employer of any artificer, or agent of any such employer, from supplying or contracting to supply to any such artificer any *medicine or medical attendance*, or any fuel, or any materials, tools, or implements to be by such artificer employed in his trade or occupation, if such artificers be employed in mining, or any hay, corn, or other provender to be consumed by any horse or other beast of burden employed by any such artificer in his trade and occupation; nor from demising to any artificer, . . . the whole or any part of any tenement at any *rent* to be thereon reserved; nor from supplying or contracting to supply to any such artificer any *victuals dressed or prepared under the roof of any such employer, and there consumed* by such artificer; nor from making or contracting to make any stoppage or deduction from the wages of any such artificer, for or in respect of any such rent; or for or in respect of any such medicine or medical attendance; or for or in respect of such fuel, materials, tools, implements, hay, corn, or provender, or of any such victuals dressed and prepared under the roof of any such employer; or for or in respect of any money advanced to such artificer for any such purpose as aforesaid: Provided always, that *such stoppage or deduction shall not exceed the real and true value* of such fuel, material, tools, implements, hay, corn, and provender, and shall not be in any case made from the wages of such artificer, unless the agreement or contract for such stoppage or deduction shall be in writing, and signed by such artificer.

**Advances of wages** are permitted and in some cases even enforced by law. In many cases where men are on piece-work their work is not completed for many weeks after it has been begun; and by the strict rule of law a man who contracts to do work is not entitled to be paid until he has done the whole of it. But it is customary for such men, in most cases, to receive every week something on account; a balance being struck when the work is completed. It is unlawful for the employer to refuse to make an advance whenever by "agreement, custom, or otherwise" the workman is entitled to it. It used to be common for some mean masters to charge their men interest or discount whenever an advance was made. Now it is unlawful for an employer to charge the workman anything for making him an advance of wages, whether he calls it interest, discount, or anything else.

**Compulsory contribution to benefit societies.**—Some employers of labour—especially large employers—establish a benefit society for their workmen, to the funds of which both employers and employed contribute. Sometimes it is left to the workman's option whether he will belong to the benefit society or not. But in many instances he is compelled to belong to it—that is, the employer will not take him into his service unless he agrees to become a member of the benefit society and to contribute to its funds. It is also provided that the contributions shall be stopped, week by week, from the man's wages. There seems to be only one objection to such a course, and that is, that by the rules of most of these private benefit societies, a man leaving the service of the employer loses the right to benefit. Now, a workman who has for years paid money into a fund of this kind naturally does not care to throw that money away; and he is likely to be very careful indeed how he offends his employer. From one point of view this is as it should be, because, amongst other things, the man is apt to work better, having more at stake. On the other hand,

he is not able to assume such an independent attitude if the employer tries to cut down his wages, to increase his hours of labour, and to deny him the benefit of a betterment in trade.

In 1893-4 a determined onslaught was made by a section of trade-unionists, who tried to persuade the Courts to declare that a clause in a contract of employment whereby the workman agreed to join a benefit society, and to allow his subscriptions to be deducted from his wages, was bad. The contention was that such a contract violated the provisions of the Truck Acts; but the highest Court in the kingdom held to the contrary opinion. So that it is quite lawful for an employer to stipulate with his men that they shall belong to a benefit society, and that he shall stop their contributions from their wages.

**It is not every workman and workwoman who has the benefit of the Truck Acts.**—The Acts only apply to the persons included in section 10 of the Employers and Workmen Act, 1875, which reads thus:—

In this Act the expression "workman" does not include a domestic or menial servant, but save as aforesaid, means any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, whether under the age of twenty-one years or above that age, has entered into or works under a contract with an employer, whether the contract be made before or after the passing of this Act, be express or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labour.

Thus, you see, all employees engaged in manual labour, except domestic and menial servants, are entitled to the benefit of the Truck Acts, but only they.

It has been decided that an omnibus conductor is not a person "engaged in manual labour." Neither is a shopman, because his work is that of a merchant. The test is, "Is the general scope of the employment 'manual' labour?" A shopman has to do a certain amount of manual labour in carrying backwards and forwards the goods he is showing to customers, but you could hardly call that the principal part of his duties. On the other hand, a shop-porter is engaged in manual labour, because the carrying about of parcels is his chief duty. Consequently, shopmen cannot claim the benefit of the Truck Acts. Shop-assistants are, however, enabled by special grace of Parliament to claim the protection of the Truck Act, 1896, against arbitrary and unreasonable fines. (*See "The Shopkeeper,"* p. 680.)

**Servants in husbandry**, which is the legal name for the whole class now commonly called "agricultural labourers," are subject to special rules by section 4 of the Truck Act, 1887. It is quite lawful for the employer to contract with such a person to supply him with food, drink (not being intoxicating), a cottage, or other allowances or privileges in addition to money wages, as a remuneration for his services. I think that the natural, logical, and legal inference to be drawn from this section is that such a contract is not legal unless the servant in husbandry has some wages in cash. And those wages are subject to the general provisions of the Truck Acts.

**Persons engaged in the hosiery manufacture** have, in addition to the



Truck Acts, a special Statute of their own—the Hosiery Manufacture (Wages) Act, 1874—which was passed to stop the practice of manufacturers who let out to their men frames and machinery at a rent. Henceforth, in all contracts for wages, the full amount is to be paid in cash; the only deductions allowed being for bad and disputed workmanship.

All contracts to stop wages, and all **contracts for frame rents** and charges between employers and employed, are illegal, null, and void. And there is a peculiar kind of penalty attached to a breach of this Act. The workman can summon his employer in the County Court, and recover the sum of £5 for every offence if the employer bargains to deduct, or does deduct, anything from his wages, directly or indirectly, for frame rent. And if the workman does not care to take action, anybody else can, and the person taking action gets his £5 and costs if he wins. Observe, please, that not only is the deduction illegal; it is equally illegal to bargain to deduct frame rent, though no deduction is, in fact, made.

In order to prevent evasion of this Statute, the word “employer” includes masters, foremen, managers, clerks, contractors, sub-contractors, middlemen, and other persons engaged in hiring, employing, or superintending the labour of the workman. And further, a “contract” is declared to include any “understanding, device, contrivance, collusion, or arrangement whatsoever on the subject of wages.” Thus, an “honourable understanding,” which might not be a legal contract, would be sufficient to bring the “employer” within the clutches of the law.

**Piece-work** has always formed a subject of controversy. There are, I believe, many labour leaders who object to payment by the piece, on the ground that it tends to inequality of wages. However this may be, numbers of artisans are paid by the piece, and not by time.

**A legal disadvantage** to the workman who is paid by results is, that there is, as a rule, no contract by the master to find work to enable the man to earn wages. In other words, if I hire you as a ploughman, to be paid so much per rod of ground ploughed by you, wages to be paid once a week, it does not legally follow that I am bound to provide any ground for you to plough. I give this by way of illustration merely, because ploughmen are never, in practice, engaged on these terms.

I suppose that the largest class of workmen who are paid by results is the collier class, and I invite the attention of all pitmen to the following case:—Messrs. Taylor, colliery owners, engaged their men on the terms of a written contract, “to hew, work, fill, drive, and put coals, and do such other work as may be necessary for carrying on the colliery as they shall be required or directed to do by the owners, or their viewers or agents.” “First, the owners agree to pay the hired parties once a fortnight, upon the usual and accustomed day, the wages by them to be earned.” Here was set out the scale of pay, being so much a ton of coal gotten. The contract went on to say that the colliers, unless prevented by sickness, etc., should do a full day’s work on every working day when required. Also, that when the pit was laid off work, the men should still consider themselves the servants of the colliery-owners subject to their orders.

It is quite evident that the pitmen in the employ of Messrs. Taylor would earn nothing unless they were called upon to work, though they would continue to be in the employment of Messrs. Taylor, and must hold themselves in readiness to work if requested. One of the men, Williamson by name, was in this service for some time without being called upon to work, and he thereupon raised an action for wages. Said he, "I was ready and willing to work; and it was your business, so long as I was your servant, to find a reasonable amount of work for me to do. Otherwise, though tied to you by the agreement, I should earn nothing." The employers resisted the claim and the Court of Queen's Bench decided against the man.

A different conclusion was come to in a later case between a coal company and a pitman. The pitman agreed to serve the company faithfully and exclusively as their servant from the date of the agreement and until twenty-eight days' notice should be given on either side. The company agreed not to discharge the man except upon twenty-eight days' notice and to pay him his wages fortnightly. The wages were, as usual, to be calculated upon the amount of coal gotten by the pitman. In this case, Chief Justice Cockburn said, "The agreement would be perfectly illusory on the part of the employers if they could say that though they were obliged to keep him in their employ, they were yet not bound to supply him with work."

The moral of these two cases seems to be that if the workman who is paid by the piece is tied to the employer's service for any length of time—that is, **if he has to give notice to leave**—the employer is bound to supply him with a reasonable amount of work, so that he can earn a reasonable sum in wages. This seems to me to be the only rational and therefore the only legal conclusion; for why should a man be obliged to give notice to quit a service in which he is not allowed to earn any wages? Lord Campbell, speaking of such a contract of employment, once said, "The necessity of giving notice clearly shows that there is some obligation on the employer. What was that? To find reasonable employment according to the state of trade."

**Breach of contract.**—A workman who leaves work without giving proper notice is guilty of a breach of contract and is liable to pay his employer damages. A master who dismisses a workman without proper notice is also liable to pay damages, for he, in like manner, has broken his contract. The damages against the master are, as a rule, the wages that would have been earned up to the time a notice to leave would have expired. Thus, a workman at a weekly wage, subject to a week's notice, can claim a week's wages if he is summarily dismissed. But this claim may be reduced if the workman is not actually out of work for the whole week, because then he has not lost a whole week's wages.

A serious question often crops up when a **workman is dismissed for misconduct before pay-day**. Thus, Nanson works for Panson, as an engineer, at 35s. per week. The week runs from Saturday morning until Friday night. On Wednesday, Nanson takes half-a-pint too much beer, is "cheeky" to the master, and is told to put on his coat and make himself scarce. The which he promptly does. Nanson has lost all right to wages for the current week—that is to say, he cannot claim wages for Saturday, Monday, Tuesday, and



Wednesday. So strict is this rule, that once when a farm servant on a yearly engagement, whose wages were payable at the end of the year, was rightfully dismissed at the end of nine months for gross misbehaviour, he was held not entitled to any wages at all.

On the other hand, a man does not lose his right to wages already due because he afterwards misconducts himself. Thus, in many shops, the week ends on Friday night, but wages are not paid until Saturday morning. Take the case of such a shop, and suppose a workman who turns up on Saturday morning "blind fou." The master can properly tell him to consider himself dismissed, but he cannot refuse to pay him his wages up to the Friday night. And in this connection it should be noticed that there are hundreds of men paid by time whose wages are due as they are earned, but are not payable until the end of the week. Thus, carpenters, I believe, are paid so much an hour (say rod.), but are engaged and paid by the week. So that a man who works for an hour on Monday morning has earned tenpence, but he does not receive it until Saturday. Now suppose a carpenter, after working for twelve hours on Monday and Tuesday, is dismissed for grievous misconduct. Although rightfully dismissed in the middle of a week, he can claim his twelve pences, because he had earned each tenpence at the end of each hour's work. But if I engage a carpenter at a wage of 40s. a week (the week beginning on Monday), and I have to turn him off on Thursday for evil behaviour, I need pay him nothing for the broken week.

I have heard the reasons for this discussed. Some say it is because wages are not "apportionable"—that is, not divisible. You either earn all your wages or none. If I hire you at 30s. a week, it is not the same as 5s. a day; and if you don't work the whole week, you can claim nothing. Others think the reason to be that when a workman breaks his contract by misconduct, he forfeits to the employer as damages the wages he has earned since the last time when anything was due. I incline to the former reasoning myself.

**A speedy way to recover wages and settle disputes** between workmen and employer has been afforded by the Employers and Workmen Act, 1875. It has been truly said that it is more desirable to have speedy judgment than exact justice; and the Statute just referred to recognises that it is of essential importance to the workman whose wages are withheld from him to be able to bring the employer to book in the quickest possible time. Now, the quickest tribunal in England is the police court or petty sessions, where the judges are the Justices of the Peace, or, in most large towns, a paid magistrate; and in London the police magistrates. In Ireland, petty sessions are similarly constituted. The Act allows disputes between employers and workmen to be heard by these Courts so long as the sum claimed does not exceed £10. In Scotland the same jurisdiction is given to the Small Debt Court of the sheriff of the county. When the claim is above £10, the workman or master must resort to the County Court in England, the Sheriff Court of the county in Scotland, and the Civil Bill Court in Ireland.

To these Courts extraordinary powers have been given for the settlement of wages and other disputes. The Court may order the payment of a sum

found due as wages or damages. It may adjust and settle one against the other all claims between the employer and the workmen arising out of the relations between them of employer and employed. For example, suppose a workman thinks he has been wrongfully dismissed without notice when he was entitled to a notice of a week. He takes out a summons before the magistrates for damages for breach of contract, claiming a week's wages. The employer, on the other hand, while denying the workman's right to notice, alleges that the man has spoiled some material. The magistrate can deal with both claims. He may say: "I find that the workman was entitled to a week's notice. I therefore award him thirty shillings damages. But I also find that by his negligence he damaged material given to him to work upon to the value of half-a-sovereign. I therefore award only twenty shillings to the workman."

I should say that when a workman and his master have a dispute, and one of them takes the other into Court, the judge or magistrate has the power to cancel the contract of employment, and may order a sum to be paid as wages or damages when he thinks it just to do so. Take the case, for instance, of a man employed on a yearly agreement, but at a weekly wage, who has contracted not to serve anyone else in the same line of business for three months after he leaves his present master's employment. At the end of six months a dispute arises about wages, and the workman brings his master into Court. If the judge or magistrate is informed by either party that it will be impossible to work harmoniously for the rest of the year, he may order the contract to be rescinded, at the same time, if he thinks it just, ordering the party who wishes to be released from his engagement to pay something as damages to the other.

**When a workman quits his employment before his engagement is up,** or without giving proper notice, he may be sued for damages by his employer. Now, it sometimes happens that before the case comes on for trial the parties agree upon an amicable settlement. This is especially so when a large number of workmen have suddenly struck work as a means of obtaining redress of a grievance. The employer may then consent that, instead of awarding damages, the Court shall only require the workman to give security that he will carry out his contract. This security consists in an undertaking by the defendant and one or more persons that the defendant will perform his obligations. The undertaking may be made verbally or in writing, and is to the effect that if the defendant does not carry out his promise, he and his surety or sureties ("cautioners" in Scotland) will forfeit a certain sum of money. The Court cannot compel anyone to enter into this undertaking, for the Act says that the defendant must be willing.



## SECTION IV.

## APPRENTICES.

Apprenticeship formerly essential—Definition—The contract is one of instruction—Must be in writing—Stamp duty thereon—Father or guardian joined as a consenting party—How far an infant may bind himself—The slave case—Infant not bound by disadvantageous contract—The "choreographic" art—The dancing professor and Barnum—Forms of indenture—A parent has no right to bind a boy apprentice—City of London custom—Apprentice cannot be asked to work at different trade—But must not be fastidious—Master has a right to apprentice's earnings—Dissolution of contract—Misconduct of apprentice—Different rules in England and Scotland—Stealing cough-drops—Confirmed and habitual thief—Cancellation by the Courts—Only "workmen" apprentices—Cancellation for master's fault—Death of master—Master removing business to a distant place—Cruelty—Personal chastisement—Illness of apprentice—When it dissolves the contract—Return of apprentice fees on premature dissolution.

APPRENTICESHIP was at one time a necessary preliminary to the lawful exercise of most trades and handicrafts. The old trade guilds regarded a person as necessarily incompetent unless he had served an apprenticeship to his trade; and in the time of Queen Elizabeth Statutes were passed making apprenticeship compulsory. To-day there is no legal compulsion on anybody to serve any apprenticeship to a trade, though the governing bodies of certain professions will not admit anyone to practise unless he has served his time under a duly qualified man. So that no one can be a solicitor, writer, or chartered accountant unless he can show that he has been duly apprenticed.

Nevertheless, apprenticeship is so advantageous—especially to the apprentice—that prudent parents and guardians, when they wish to bring a lad up to a particular trade, invariably apprentice him to someone who follows that trade. I say that the contract of apprenticeship is particularly advantageous to the apprentice, for several reasons. In the first place, it puts him under the command and discipline of someone who has a legal right to make him work. In the second place, it imposes the legal obligation on the master of teaching and instructing the apprentice. Moreover, the master of an apprentice has a legal right to demand from the latter not only attention to and diligence in his work, but also good behaviour generally. So advantageous is the contract considered, indeed, that a minor who enters into it is bound by it in the same way that he is bound by contracts for "necessaries."

In former times apprentices almost invariably lived in the master's house and were regarded as part of his family. Far be it from me continually to belaud the times that have passed, but I cannot help thinking that the old style of treatment of apprentices was, on the whole, a good thing. The ancient citizen and craftsman treated his young charges almost like a father, and the 'prentice boys were zealous for their master's credit, and not seldom felt themselves called upon to defend the same by stout blows well laid on with oaken cudgels.

The contract of apprenticeship is, in a sense, a contract of service, but this

is not its only, or, indeed, its principal feature. Primarily it is **a contract by the master to teach and by the apprentice to learn** a trade or handicraft. This is alike in all the countries of the United Kingdom. The apprentice is a "workman" only in the sense that he comes under the Employers and Workmen Act, 1875, and under the Employers' Liability Act.

In England, as in Scotland, **a contract of apprenticeship must be in writing**. It may be, in England, under seal—that is, sealed with the seals of the parties thereto; but in neither country is it binding if it is merely by word of mouth. In Scotland, the writing must be "probative"—that is to say, must be signed in the presence of two witnesses, who must also sign (*see form*, at p. 825). If the indenture is not witnessed in the proper manner, it is void and of no effect, unless something has been done under the contract. For instance, suppose a youth in Glasgow is apprenticed to a grocer, and an apprenticeship indenture is drawn up, but is not attested or verified by witnesses, the contract is not of any effect. But if the youth actually enters his master's service, and begins to learn the business, this partial performance of the contract cures the defect of legal form. You will find this principle of the Scots law further illustrated in the case of leases (*see* p. 168).

**Stamp duty** is payable on indentures of apprenticeship except in the case of parish apprentices, or young persons apprenticed at the sole charge of any public charity—*public* charity, mind. For if benevolent Mr. Brown takes upon himself to apprentice at his own expense the destitute orphan son of poor Smith, Brown will have to pay stamp duty on the indenture. It does not now make any difference whether a premium is paid or not. In all cases (except where the apprentice is bound at the expense of a charity) the stamp duty on indentures is 2s. 6d. I say "in all cases," but this is not quite true, for if you article your son to a solicitor you will have to pay a stamp duty of £80, irrespective of the amount of premium. For my part, I consider it a hardship to make people pay any stamp duty whatever on articles of apprenticeship. Half-a-crown is a consideration to a poor man with a large family; and it has always struck me that the powers that be ought to encourage apprenticeship and not to put a tax on it. If ever there was a tax on industry and providence, this is one. I may say, that if you omit to state the amount of premium, so as to evade the duty, the articles are null and void, and all parties thereto are liable to a penalty for defrauding the Revenue.

As a rule, when a boy is bound apprentice, his **father or other guardian is joined with him** as a consenting party; and such father or guardian engages that the 'prentice will carry out his contract. In the opinion of one eminent Scots jurist, this is **necessary in Scotland**. Other Scots lawyers do not think so. In view of the conflict of opinion, it is certainly wise, and I advise all my Scottish readers who are bound themselves, or who happen to be parents and guardians putting out lads to a trade, or prospective masters, to see to it, that the father or guardian of the apprentice joins in the contract. If the apprentice is under fourteen, his father (or tutor, if the father be dead) signs the indenture on the apprentice's behalf. If the youth be over fourteen, but under twenty-one, the proper plan is for him to contract and sign on his own behalf, and his father



(or curator) to contract as a cautioner, to guarantee that the apprentice shall do his duty, and also to consent to the youth entering into the agreement.

In England, the parent's or guardian's consent is unnecessary, from a strictly legal point of view. I know this is not the doctrine popularly received. Many imagine that a boy cannot, by himself, bind himself apprentice. Others think that a boy who has parents cannot bind himself without his parent's consent. These views are equally fallacious. A boy has just as much right to bind himself apprentice to a trade of his own free and unfettered motion as he has to buy food without asking the leave of anybody. And the contract, unless it is clearly disadvantageous to the infant, is binding on him, subject to this proviso—that he can, when he comes of age, repudiate it within a reasonable time. What is a reasonable time, is a matter depending in each case upon the particular facts of the particular case; and it is quite impossible to fix the exact limit for your guidance. I can only say that, in my opinion, an apprentice who does not renounce his apprenticeship within three or four months after he attains majority, is likely to be held out of time if he attempts to break away after that interval. A young gentleman who waited for eighteen months and then repudiated his engagement, was held to be liable to pay damages.

But although a person who has signed himself apprentice when under age is bound by the contract, it does not follow that he is liable upon any kind of promise made by him just because that promise is contained in an indenture of apprenticeship. By the law of England, he is, though an infant, liable to pay the agreed premium, unless the Court considers that premium so large as to be unreasonable—a thing depending entirely on the kind of trade he is bound to. Thus, what would be a moderate premium for an engineer's apprentice, would probably be absurdly large for the apprentice of a barber. Again, the apprentice is liable to an action for damages, and occasionally to magisterial correction, if he breaks his agreement by absenting himself from work, or by evil conduct. And it has been held that a stipulation by the apprentice that he will not, after he has served his time, enter the employment of a rival firm, is good so long as the area within which he is not to seek employment is reasonable—in fact, so long as the contract is not in unreasonable restraint of trade. (See p. 314.) To put it shortly, articles of apprenticeship are binding on the apprentice (under age), so far as they are reasonable; and any clause is reasonable which is for the reasonable protection of the master. The logic of it is this: unless the master is allowed to insert stipulations for his own reasonable protection and advantage, he will not take the apprentice at all. Now, it is to the youth's advantage to be apprenticed. Therefore it is to his advantage to agree to clauses for the master's reasonable protection and advantage.

This doctrine has been carried to great lengths. In one case in the last century, a negro boy, born a slave in the West Indies, was brought to England by his master. It was just after Lord Mansfield had decided the case of the negro *Somerset*, holding that slavery was unknown to British law, and therefore, that a slave brought to Great Britain could not be coerced or imprisoned by his master. This decision is often quoted as proving that—

"Slaves cannot breathe in England: if their lungs  
Receive our air, that moment they are free;  
They touch our country, and their shackles fall."

If this means that a slave becomes a free man by coming to England, it is a mistake. Somersett's case only laid it down that in England the master of a slave has no means of asserting his right of property. In other words, if the fortunate Somersett had ever gone back to the West Indies, he would still have been the slave of his former owner. His freedom was a purely local matter. He did not become emancipated by coming to England, any more than he would become a slave by making the return voyage. It was only that the laws of Great Britain did not recognise slavery in Great Britain; and therefore the rights of ownership were suspended while the master and slave were in the country. It was the slave's own foolish fault if he ever went back home.

To return to our woolly-headed boy. This boy came over to Bristol with his master, who, fearful of losing his property, caused the lad to sign an indenture, by which Sambo bound himself apprentice to his master for seven years. A benevolent Quaker took compassion on the poor black, and, when his master's back was turned, persuaded Sambo to go to live with him (the Quaker). The master promptly brought an action against the philanthropist and against the apprentice; and the latter was ordered to return to service—not, of course, on the ground that he was a slave, but on the ground that he was an apprentice. It was argued, on the other side, that the master's only desire was to take poor Sambo back to the Indies, and that the contract of apprenticeship was injurious to the boy, and could not be sustained. But the judges said that it was not so. The contract, they said, was beneficial to the boy—highly beneficial, because by making a contract with him, the master admitted him to be free. This was, no doubt, sound law; because a master cannot make a contract with his slave any more than with his ox, or his ass, or any other chattel that is his. And so Sambo was delivered over to his master. Whether he had the courage to assert his liberty out in the West Indies, I make bold to doubt. They were no respecters of persons out there—of the persons of "niggers," at any rate—in those days.

But the rule that a contract of apprenticeship is binding upon a person under age rests solely on the ground that such a contract is for his advantage. And in looking at any particular case you are to take the whole contract and ask yourself, "Is the contract—the whole contract—for the benefit of the infant?" If this is not the case, then the whole agreement is void. On the one hand, you must not point to one particular stipulation, and, because it is against the infant's benefit, say that the whole contract is non-beneficial. On the other hand, you have no right to put your finger on one bright spot, and say that because it makes for the apprentice's benefit, therefore the whole agreement is sound. As in every other contract, you must expect to find some stipulations in favour of one party, and others in favour of the other.

A good illustration of the kind of contract held unreasonable is associated



with the name of that prince of showmen, Barnum. Two little girls, Ada Parnell and Helen Parnell, aged respectively twelve and fourteen years, had been bound apprentice to Signor de Francesco, to be taught the "higher branches of the choreographic art," as the indentures put it—which means, in the English tongue, the art of stage-dancing. Ada was bound for twelve, Helen for seven years. The choreographic Signor was to be at liberty to obtain engagements for the two girls, and was to pay them for the first three years 9d. per night, and 6d. for a *matinée*; and for the rest of the apprenticeship 1s. per night, and 9d. for a *matinée*. In the event of there not being sufficient dancing, the budding Taglionis might be required to do "utility business"—that is, to form one of a stage crowd, at 6d. for each performance. The apprentices were not to serve anyone other than de Francesco during the term of apprenticeship, and were bound to accept any engagement he made for them. De Francesco had power to put an end to the apprenticeship if the apprentice did not exercise "her talents and best endeavours," or failed to attend practice and rehearsal punctually, or was insubordinate, or practised the art of stage-dancing under the direction of any person other than the Signor. Mrs. Parnell, the mother of the two girls, was bound to see that they fulfilled the contract, and to forfeit £50 if they failed to do so. One peculiar part of the agreement was that neither of the apprentices should enter into matrimony during the term of apprenticeship.

It appears that work was slack with Signor de Francesco, and the two apprentices were out of an engagement, when the great and only Phineas T. Barnum came over to London with "The Greatest Show on Earth," and pitched his tent at Olympia, Kensington. The showman required, for purposes of a huge ballet, some hundreds of ballet-girls; and he applied to Signor de Parravicini, a theatrical agent, to engage them. Ada and Helen Parnell applied and obtained situations, and displayed their choreographic skill on the Olympian boards. Great was the wrath of de Francesco; for the damsels had not obtained his permission for the engagement and they had the execrable taste to put their wages in their own pocket.

The irate instructor thereupon took action, in a liberal and comprehensive style, against the two girls and their mother for breach of contract, against Parravicini for enticing away his apprentices and against Barnum for employing them. But he failed. Lord Justice Fry had the unkindness to observe that the contract of apprenticeship was one-sided. "How," said the learned judge, "can this agreement be said to be fair to the apprentices, when they are not to be paid a farthing unless they obtain an engagement? They are not to accept employment without Francesco's permission, but he is under no sort of obligation to obtain a single engagement for them." This alone was enough. But on top of it was the fact that the two young girls were bound to go to any part of the world whither the Signor chose to send them. Wherefore the contract was null and void. So that Ada and Helen could not be sued for breach of agreement, Mrs. Parnell could not be made liable for allowing her daughters to break an agreement that did not exist, Signor de Parravicini was guiltless of enticing away apprentices, because there were





- [Wages] Smith during the said term as wages for the first year the sum of 5 shillings per week, for the second year the sum of 7s. 6d. per week, for the third year 10 shillings per week, for the fourth year 12s. 6d. per week, and for the fifth year 15 shillings per week, payable every Saturday [see (1) below]. And further, that James Smith shall not be required to attend to the business or affairs of
- [Hours] John Jones for a longer period than — hours in each day, unless James Smith shall be detained by an extreme pressure of business. [*This clause usually unnecessary in the case of factories and workshops.*] And in consideration of the covenants herein contained on the part of John Jones, Thomas Smith, with the consent of James Smith, doth hereby place and bind James Smith, and James Smith, with the consent of Thomas Smith, hereby places and binds himself with and to John Jones for the term aforesaid. And during that term James Smith shall honestly, diligently, and faithfully serve John Jones as his true and lawful apprentice, his lawful and reasonable commands will obey, his property will not damage nor suffer to be damaged, but shall in all things conduct himself as an honest and faithful apprentice. And for the consideration aforesaid, Thomas Smith covenants and agrees with John Jones that James Smith shall and will serve John Jones as his apprentice in manner aforesaid [see (2) below].
- [Return of premium] Provided always, and it is hereby agreed that in case James Smith shall die within one year from the date hereof, or his health shall fail so as to incapacitate him from following the trade or business of a saddler and harness maker (such
- [Death or illness of apprentice] failure of health to be certified by two medical practitioners, appointed one by John Jones and one by Thomas Smith), John Jones shall return to Thomas Smith the sum of [£25], part of the premium paid to John Jones. Provided also, and it is agreed that in case John Jones shall die before the expiration of the said term of five years, then the executors or administrators of John Jones shall as soon as may be provide for James Smith another suitable master on terms equally beneficial to James Smith as those herein contained, or in default shall return and pay to Thomas Smith £10 for every year and a proportionate part for every fraction of a year for the said term of five years which shall be unexpired at the date of the death of John Jones. Provided also, that in case
- [Dismissal for misconduct] James Smith shall during the apprenticeship wilfully disobey the lawful and reasonable commands of John Jones, or shall in any other manner be guilty of gross misconduct, the said John Jones may by a notice in writing signed by him dismiss James Smith from his service, but upon such dismissal John Jones shall repay to Thomas Smith £10 for every year and a proportionate part for every fraction of a year of the said term of five years which shall be unexpired at the date of such dismissal.

In witness whereof the said parties to these presents have hereunto set their hands and seals the day and year first hereinbefore written.

Signed, sealed and delivered by	}	John Jones.	(Seal.)
the said John Jones, James		James Smith.	(Seal.)
Smith, and Thomas Smith		Thomas Smith.	(Seal.)
in the presence of			

William Williams,

10, Green Lane, Shoreton (Clerk).

(1) *Clause to be inserted in the case of indoor apprenticeship:*

And John Jones will during the said term find and provide the said James Smith with good and sufficient board, lodging, washing, and medical attendance.

(2) *Clause to be inserted in the case of outdoor apprenticeship:*

And Thomas Smith will during the said term find and provide James Smith with good and sufficient [board and lodging], clothing [washing], [and medical attendance and all other necessities].

When the apprenticeship is "indoor," miss out the words in brackets.

FORM OF APPRENTICESHIP INDENTURE (*Scotland*).

It is contracted, agreed, and ended between Robert Bruce, of 12, Sauchiehall Street, Glasgow, of the first part, and William Wallace, with the advice and consent of Douglas Wallace, his father, and Douglas Wallace for himself and as cautioner, of the second part, in manner following: That is to say, William Wallace, with the advice and consent foresaid, hereby binds himself to the said Robert Bruce in his art, craft, and trade of saddler from the date hereof for the term of five years; and the said William Wallace binds himself that he will be to the said Robert Bruce [his partners, executors, and successors in business], during the said term a true and faithful apprentice; and that he will be diligent, punctual, faithful, and obedient in the performance of his master's business and the preservation of his property and goods. And the said Douglas Wallace hereby binds himself as cautioner for the faithful performance by the apprentice of his duties and service for the space and in the manner foresaid. [And the said Douglas Wallace further binds and obliges himself to furnish the said William Wallace with food, lodging, clothing, tools, and other necessities during the apprenticeship.\*] For which causes and in consideration of an apprentice fee of £— paid by the said Douglas Wallace to the said Robert Bruce, the receipt of which is hereby acknowledged, the said Robert Bruce binds and obliges himself to instruct the apprentice in his said art, craft, and trade of a saddler in like manner as he himself practises the same. And the said Robert Bruce further binds and obliges himself that if the said William Wallace shall die before the expiration of the said space of five years he, the said Robert Bruce, will repay to the said Douglas Wallace the sum of £— for every year then unexpired of the said space and a proportionate sum for every fractional part of a year so unexpired. And the said Robert Bruce further binds and obliges himself that he will make the like repayment if the said William Wallace shall, before the expiration of the said space, become physically or mentally infirm so as to be permanently unable to follow the craft to which he is hereby bound, provided that such infirmity be certified by two registered medical practitioners, one appointed by the said Robert Bruce and the other by the said William Wallace, and the obligations of this indenture shall be thereupon dissolved.

In witness whereof, these presents, consisting of this and the [two] preceding pages, written by [William Macpherson, of 12, Forfar Place, Falkirk, Writer's Clerk], on paper duly stamped and subscribed by the said Robert Bruce, William Wallace, and Douglas Wallace, at 15, Cowcaddens Road, Glasgow, in the presence of these witnesses: Andrew McTavish, of 15, Cowcaddens Road, Glasgow, Flesher, and Dugald Campbell, of the same address Flesher's Assistant.

Witnesses:

*Andrew McTavish.*

*Dugald Campbell.*

*Robert Bruce.*

*William Wallace.*

*Douglas Wallace.*

In order that there may be no misapprehension, let me say that a parent or guardian has no right to bind his child apprentice. It is the boy who binds himself, or he is not bound at all. The parent or guardian simply joins in the indenture in order that the employer may have some responsible person to "go for" if the apprentice should prove refractory. It is also advantageous for the apprentice, because he has someone with a legal right to protect his interests.

I ought, perhaps, to say, that in the City of London, a boy of fourteen years of age is bound by a contract of apprenticeship just as an adult man would be bound by a contract. This is by local custom. The consequence is, that he

\* Omit this paragraph if indoor apprenticeship.



cannot throw up his contract when he becomes twenty-one; and is liable to an action in person if he fails to keep his agreement in every particular.

The master has **no right to ask the apprentice to work at a different trade** than the one he has been apprenticed to. I do not mean that the apprentice can object to do anything and everything that is not actually in the way of learning his trade. Strictly speaking, an apprentice is not being instructed in his craft when he is ordered to carry a parcel to a customer, or to do any other little job of that sort; but when he is told to do such things he must do them. He must not, in fact, be over-fastidious. The reason is, that by long-established usage of masters and apprentices, these services form part of an apprentice's duty. At the time when apprentices invariably lived in the master's house, they were accustomed to perform various little household services: such as waiting on the master at table, and so on.

But although the master has a perfect right to make use of the apprentice in his business in almost any way he pleases so long as the apprentice is, after all, taught his trade, it is a very different thing when he seeks to employ the youth in some other business altogether. To take a common case. Suppose a master carries on the two businesses of sanitary engineer and house-decorator. If he has a boy apprenticed to him to learn sanitary engineering, he cannot set him to the work of house decoration. Suppose that he does employ the apprentice at a decorating job for a week or two, however, this is not a total breach of the apprenticeship agreement, nor does it justify the apprentice in throwing up the service. He should simply refuse to obey the order, which is not a "lawful and reasonable" one.

**The master has a right to the apprentice's earnings**, not only while he is working in his service, but even if he leave him and earn money elsewhere. In the time of the Napoleonic wars, many apprentices, dazzled by the glory of the names of Nelson and Collingwood, of Calder and St. Vincent, cried, "Victory, or Westminster Abbey," deserted their masters, and volunteered to serve the king. Such an apprentice was a boy named Carsan, who was bound apprentice to one William Crozier. Carsan saw his fair share of fighting, and the ship on which he served was fortunate enough to capture two "parleyvoos" of such value that the prize-money of every sailor came to £51 9s. Besides this, wages were paid on a liberal scale. Then up stepped Mr. Crozier, the master of the valiant apprentice, and claimed both wages and prize-money. His claim to the wages was admitted; but as to the £51 9s., Carsan would not give it up. So they went to law, and Carsan's counsel argued thus, "It is an extraordinary assertion to say that an apprentice to a civil business, going to sea out of his master's tuition, shall earn for his master not wages only, but prize-money, the compensation of danger and wounds."

This argument prevailed; and so the law was established that any wages earned by an apprentice (even though he has left his master) belong to the master; but any sum earned by him not as wages, but for some extraordinary exertion, belongs to himself. Thus, if after the apprentice has done his day's work as required by the master, he chooses to employ himself in some remunerative work in his own time, the fruits of his industry belong to himself.

The doctrine that the apprentice must labour for the master's benefit leads also to the conclusion that anyone who entices the apprentice away from his work does an actionable wrong against the master. The action is one for seducing the apprentice from his duty, whereby the master has lost his services. It may not be generally known that the action (in England) commonly called the action of seduction, is not an action by the woman who has been seduced, but by the master of that woman. As a matter of fact, the girl's parents generally bring it, but they always have to prove that their daughter was in the habit of doing some service at home. Any slight task is enough. Thus, a daughter who poured out the tea every afternoon was held to be her father's servant. I want to point out here that the offence, in law, is the doing of an act whereby the parent loses his child's or the master his servant's services.

**When the contract is dissolved.**—*Misconduct of the apprentice* gives the master a right to dissolve the contract and put an end to the relations between them. This rule is established for the simple reason that no one would take an apprentice without it. But I must warn masters to be careful how they apply this rule. In the chapter on Mistress and Maid, I have written somewhat of the rights of Mrs. de Smythe to dismiss Mary when the girl misbehaves herself; and it is a rule which always applies to servants of every kind, that misconduct warrants dismissal. But an apprentice is not, strictly speaking, a servant. He is bound to serve, it is true; but he is not a servant in the same way that an ordinary workman is. And the law, looking, as it does, with compassion on the frailties of youth, will not allow a master to dismiss his apprentice for reasons that might warrant the dismissal of a workman.

Thomas Winstone had a son, also named Thomas, whom he apprenticed to one Linn, who plied the trade of a tobacconist. For four years was young Tom to serve Linn. A considerable premium—£90—was paid, and the apprenticeship was to be of the indoor kind; that is, Tom, junior, was to live at Linn's shop, and be fed by him. Linn pocketed the premium and young Winstone entered upon his duties. He was not, however, a very satisfactory apprentice—not one of the kind who marry the master's daughter and are admitted into partnership. His failing was rebelliousness. Scarcely had he been four months in the shop when he was ordered to add up the day-book, and he point-blank refused. Being rebuked, he flung out of the shop, declaring that he would never enter it again and went home to his father. Now Winstone, senior, was a man of sound judgment; for having argued the matter out with his young hopeful, he succeeded, by the laying on of hands, in persuading him how wrong his conduct was. And so the boy, after an absence of two days, returned to Mr. Linn, made apology and offered to resume his work. One would have thought that Linn would have been satisfied with the *amende honorable* and the promise "not to do it again," but he was not. Said he, "You were disobedient. You left me, and said you would ne'er return. You shall not return. Away with you." But Mr. Linn forgot to return the premium of £90; indeed, he never mentioned it once.

The judges looked at it in this light: "The argument is, that if the apprentice be guilty of a single act of misconduct, or be absent from the service



of the master for two days, he is to lose the benefit of the instruction to which he is entitled by the indenture, and for which the premium of £90 was paid; and it has been said that the act of going away, accompanied with the declaration that he would not return, deprived him of the protection of his master. But it would be most unjust."

In the same way a chemist was checkmated who tried to get rid of an apprentice with whom he had received a premium of £99 19s. The ingenuous youth had been "guilty of fraud and robbing his master," according to the master. In reality he had stolen a few cough-drops, and taken two or three pence from the till—very reprehensible, no doubt, and sufficient to entitle the man of drugs to give him a curative application of birch-rod, tawse, cane, or other similar corrective, but not enough to make the whole contract liable to cancellation.

Although an isolated act of misconduct, or even frequent acts of a trivial character, will not warrant the master in dismissing the apprentice, yet misconduct may reach such a pitch that dismissal will be justified. How great, you will ask, must the misconduct be to warrant this extreme course? The answer is, when the apprentice, by his behaviour, renders it practically impossible for the master to carry out his part of the bargain. Thus, Arthur Pickard was apprenticed to Mr. Brook, of Halifax, to be instructed in the arts and mysteries of the pawnbroker, the silversmith, and the jeweller. And doubtless he would have learned them well and thoroughly had he been able to keep his hands from picking and stealing. But Arthur was a systematic thief—an habitual stealer. He was caught by means of a marked sixpence, and then confessed that for months he had been robbing the till, sometimes taking as much as 5s. at a time. Mr. Brook found Master Arthur's assistance somewhat expensive at the price, and so turned him out. An action was brought for damages. The judge (Sir A. L. Smith) found that the charge of habitual thieving was proved, and then the boy's counsel had the courage to contend that even if it was so, the master had no right to put an end to the apprenticeship. This proposition, put in a practical form, means that an employer who has been continuously robbed by an apprentice can only get rid of the thief by paying him damages. Mr. Justice A. L. Smith rejected the proposition and decided for the master.

And, again, an apprentice who persistently declines to be taught cannot complain if he is told to go about his business. Baron Martin, a judge who was always ready with an apt illustration, said on one occasion, "If I am a house-decorator, and have an apprentice, to whom I say, 'Mount that ladder and I will teach you house-decorating,' and he refuses to go, it is impossible for me to perform my contract. And the law does not exact from any man impossibilities."

The English rule is, then, that a master can only dismiss any apprentice for misconduct when that misconduct makes it practically impossible for the master to carry out his contract to instruct. There is an exception in the City of London, where, by a local custom, a master can dismiss an apprentice who frequents gaming-houses.

The rule of the Scots law is rather more strict against the apprentice. The Scottish authorities hold that for repeated insolence, disobedience, and disrespect, callous neglect of the master's business, or repeated absence without leave, the master may send the apprentice packing. In England, as we have seen, absence without leave is not a ground for dismissal, for the master is bound to receive the apprentice again when he returns and offers his services.

**Cancellation of contract by the Courts.**—I may say that under the Employers' and Workmen's Act, 1875, power is given to the Justices of the Peace, in England and Ireland, and to the Small Debts Court in Scotland, to order the rescission or cancellation of contracts of apprenticeship in certain cases. In the first place, the Act only applies to apprentices to the business of a "workman" (p. 813). Even then it does not apply if a premium of more than £25 has been paid. A "workman" is one who is a servant in husbandry, journeyman, artificer, handicraftsman, miner, or other person engaged in manual labour. So that it does not apply to shopkeepers' apprentices, *e.g.* the apprentices of a draper, barber, grocer, etc. The way the Act works is this:—Suppose you are a carpenter to whom Donald Smith has been apprenticed (premium not more than £25), and Donald's father, William Smith, is also bound for the good behaviour of his son. But Donald's behaviour is anything but good. He refuses to work, he comes late every day, he refuses to obey your just and lawful commands. You can summon both Donald and his father before the magistrates (Small Debts Court in Scotland). Their worships, on being convinced of the apprentice's manifold transgressions, can do one of several things. They can simply make an order that Donald shall perform his duties under the apprenticeship. In addition to this they may order the father to be bound over in a penal sum that his son shall perform his duties. Or they may order the father to pay damages. Or again, they may cancel the apprenticeship altogether. When they do cancel the apprenticeship, they can, if they think right, order you to repay part of the premium you received with this lad. This last order—that is, the cancellation of the indenture—is only resorted to with the greatest reluctance, and where it is manifestly impossible for master and apprentice to have amicable relations for the future. A good deal depends upon the kind of service. If the apprentice must necessarily be brought into continual contact with the master, and if there is evidently a good deal of bad blood between them, a request for cancellation may be attended to. And the like where the apprentice or the master is a person of bad character. For the Act is just as much for the benefit of the apprentice as it is for the benefit of his employer. The apprentice can summon his master before the Court for ill-treatment, non-payment of wages, neglect to teach him his trade, or, indeed, when any dispute arises founded on the relations of the two.

**Cancellation for the master's fault.**—It is somewhat difficult to say what acts or defaults of the master will entitle the apprentice to leave him. In England the master's bankruptcy, and in Scotland his sequestration, which is the equivalent of English bankruptcy, dissolves the apprenticeship. This, I suppose, rests on the ground that a bankrupt master is not in a position to



carry on business ; and, therefore, he has put it out of his power to carry out his share of the bargain. And it may be stated generally, that in both countries **when the master puts it out of his power to carry out the contract** the apprenticeship falls through ; the apprentice is entitled to go and can raise an action for damages. When I say "puts it out of his power to carry out the contract," I speak of the contract as a whole and ask you to bear in mind what I said before—that a contract of apprenticeship is principally and primarily a promise by the master to instruct and by the apprentice to learn. Therefore, the master puts it out of his power to fulfil his promise, when he does something which disables him from continuing to teach the trade or trades agreed to be taught. It is easy to perceive, then, that when a master retires from business it is a total breach of contract on his part. Perhaps it is not quite so easy to apply the principle above stated to a case of this kind :—Brown is bound apprentice to Jones, who carries on the business of house carpenter and decorator. Brown's indentures say that he is to learn the whole trade carried on by Jones. After two years have elapsed, Jones gives up the carpentering part of his business and confines himself to house decoration. How does he stand as regards his apprentice ? Can the latter claim to be released entirely, or must he continue to serve his articles out and claim compensation for not having been taught one of the trades ? The answer is, that the giving up of one of the trades agreed to be taught is a total breach of the contract, entitling Brown to renounce his apprenticeship and immediately to raise an action for damages against Jones.

Again, when a boy is bound apprentice to learn a trade, he has a right to be taught the whole trade and not a part of it. To take our last illustration of young Brown, apprenticed to Jones the house carpenter and decorator, Jones does not fulfil his promise to teach if he merely teaches Brown to saw and to plane and to mix paint. **It is a breach of contract for the master to restrict his instruction merely to a part of the business.** And the apprentice is quite justified in withdrawing from the service and claiming compensation if no serious attempt is made to teach him the whole of his trade. I had a case before me the other day of a saddler's apprentice, bound for a term of five years to one who agreed to instruct him in the business of a saddler and harness maker. The facts as laid before me were, that the only employment given to the apprentice during the three years he had already served was to sweep out the shop, go errands, and to stuff horse-collars. Once he had been set to mend a stirrup leather. I advised the apprentice's father, who had been bound for his son's good conduct and performance of his contract, to write and demand that the youth should be advanced from the stuffing of collars and the sweeping of floors to other parts of the business ; and that if this were not done he should bring an action for damages in the names of himself and his son, and take his son away. I also advised that the apprentice had no right to object to sweep the floor occasionally, or to be sent out on an errand sometimes. But what he could rightfully object to, was to be employed on these jobs to such an extent that he could not learn his business.

The death of the master cancels the contract altogether, unless there is a stipulation in the indenture that the apprentice shall serve his executors or successors in business. And the dissolution of a firm also puts an end to the contract when the apprentice is bound to the firm. But when so bound to a firm, the mere fact that a partner retires does not release the apprentice unless the firm itself is dissolved by that partner's retirement. There is one difference between the Scots and the English law relative to the apprentice's position on the master's death. By the English law, when a premium has been paid, and the master dies before the apprentice is out of his time, the latter has no claim to have any part of the fee returned. This seems to me to be a very hard law. The only way to guard against the hardship, is to agree, in the articles of apprenticeship, that if the master prematurely dies, a proportionate part of the premium shall be returned (*see* form on p. 824). There is no need for such an express agreement in Scotland; for there, when the master dies, the law enacts that his executors shall return a proportionate part of any premium that was paid. And a very just and proper law, too.

Another way by which the apprenticeship contract may be ended is by the master removing his business to a place distant from that where he carried on business when the apprentice was first bound. I am not aware of any Scottish case on the point; but there is an English case, decided in the Court of Appeal, which bears directly on the matter. A youth was apprenticed to a firm of engineers, who carried on a business both of repairers and manufacturers in the south of London. The father was, as usual, bound to see that his son served according to the contract and that he was properly fed and clothed. The apprentice's wages were to begin at 5s., rising to 15s. per week. After serving for some little time, the youth was told by his masters that they had decided to split up the business. Two partners were to leave London and set up as a separate firm in Derby. The other two members of the firm were to remain in South London. The Derby establishment was to devote itself solely to manufacturing. The London firm was to give up manufacturing altogether, do repairs only, and also act as agents for the Derby firm. "If you like to go to Derby," the apprentice was told, "you can have a rise in your wages of 2s. a week. Otherwise, we will allow you to have your indenture back." The apprentice and his father refused both alternatives. Then the masters ordered the lad to proceed to Derby. He refused and brought an action in the County Court for £50 damages for breach of the apprenticeship. And he won. For the case being taken to the Court of Appeal, that Court decided that the command to go and serve at Derby was unreasonable; that unless the contract expressly stipulates the contrary, a contract of apprenticeship is to be carried out at the place where it commences; and that for the master to remove his business to an unreasonable distance is a total breach of contract by him.

In Scotland, cruel treatment of the apprentice by the master is a sufficient reason for the apprentice to decline to serve any longer. It is, in fact, a total breach of contract and the apprentice is entitled to damages for it as well as to quit the service. I am not sure that this is the case in



England. It may be so; but I think the proper remedy of an apprentice for cruel treatment in England would be to summon his master for assault.

This brings me to consider the question of **personal chastisement** of an apprentice by his master. There are plenty of opinions of judges in England, as well as in Scotland, from which it may be inferred that a master has the right to chastise his apprentice for disobedience or misconduct. One old Scottish writer of great authority lays it down as part of the law of Scotland. And in England it used to be considered as undoubted law. For instance, in the case of the chemist's apprentice who pilfered from the till and the sweet-bottles (*see* p. 828), one judge said that the master had no right to dismiss him, but should have chastised him for his offences.

But the trend of opinion nowadays is rather against the flogging system, whether it applies to wives, children, servants, or apprentices; and though I do not know of any authority for saying that a master has not the right in circumstances of great provocation to administer personal correction, yet I should hardly advise a master to try to keep his apprentice in order by that means. And for this reason:—When you begin flogging, your temper may easily get the better of you; and the law certainly gives you no right to inflict any but a moderate punishment. Beating with many stripes is unlawful. So is beating with a heavy stick, or a horsewhip, or any other dangerous weapon. Moreover, the proverbial “cuff” on the ear is wrong, because the apprentice may easily be made deaf in that way.

I have never known the point raised in any Court, but it has often struck me as very doubtful whether, if on the master trying to chastise the apprentice the latter were to reverse the *rôle* and chastise the master, the master would have any legal remedy. My own impression is that he would not. If he should summon the apprentice for assault, it seems to me he would be well answered by the plea: “You were hitting me and I struck out in self-defence.” So that my advice to masters is:—Confine your flogging to apprentices of tender years. A Scottish writer is of opinion that it is *prima facie* illegal to flog an apprentice unless the latter is very young. “Hands off!” is the safest plan, certainly.

The illness of the apprentice does not dissolve the contract, unless it is an affliction of so permanent a character and of such a nature that it is impossible for him to learn the trade. Thus, if a youth is apprenticed to a mechanical engineer, and he is smitten with paralysis of one side, his indenture would be cancelled. But if he had (say) small-pox, he could not be dismissed, though he might have to be absent from work for six months. And the master would have to pay his wages for the whole time of the absence, unless there was some stipulation to the contrary in the articles. And if the apprentice be an indoor one, the master must find proper medical attendance for him, unless his father has agreed to provide it.

**Return of premium or 'prentice fee** cannot be claimed when the apprentice is dismissed for misconduct, no matter how soon after the commencement of his time, nor how large the premium might be. Moreover, if the apprentice falls permanently ill or dies, the master is not bound to return

any part of the fee, unless he has specially agreed to do so (*see* the forms on pp. 823-5). I have known people to quarrel with this rule on the ground of its unreasonableness. They say: "We can understand why an apprentice dismissed for misconduct cannot claim a return of premium, but not why he cannot claim any return when he is deprived of the benefit of the indenture by no fault of his own." The answer is found by going a little deeper. A agrees to pay X £50 if X will do such a thing. X is ready and willing to do it, but is prevented by something which happens to A. It may be no fault of A, but neither is it any fault of X. And the principle of law is that when a man does what he promises, or is ready and willing to do it, but cannot because the other man does not carry out his promise, the first man is entitled to the stipulated reward. The master says: "I was willing to instruct, but could not, because the apprentice did not come to learn." And on that ground he is entitled to the full apprentice fee. Not only need he not return any of what has been paid, but he can claim any that has not been paid.

## SECTION V.

### EMPLOYERS' LIABILITY : COMPENSATION FOR ACCIDENTS.

**Employers' Liability**—The "prudent business man"—Liability of master for his servants' acts—Doctrine of common employment—When employer is liable outside the Employers' Liability Act—When he personally interferes—When he supplies improper machinery—When he engages improper fellow-servants—What is common employment?—There must be a common master—**LIABILITY OF MASTER UNDER EMPLOYERS' LIABILITY ACT**—To whom liable—Not to all employees—Relatives of workmen killed can claim sometimes—Scots law—Who is liable to pay—The "master"—Not necessarily the man who pays the wages—Sub-contractors—Dock labourers and builders' labourers—Colliers and the *butty* system—For what acts is the master liable?—Defective machinery, plant, ways and works—Negligence of superintendent—Or of a person whose orders the workmen are bound to obey—Not bound to obey a command to do wilful injury—Defective rules and bye-laws—"Particular instructions"—Specially for railway servants—What is a railway?—Locomotive?—Train?—When and how to claim compensation—Time to begin action—Not more than three years' wages can be recovered—A hard case—Deductions—Defences set up by the employer—Contracting out—Already compensated—"Outside the scope"—Acceptance of risk—Does a man accept a risk because he knows of it?—Workman's own negligence—**WORKMEN'S COMPENSATION ACT**—To whom it applies—Amount of compensation—Workman's own wilful misconduct—Old rights left untouched—No negligence need be proved.—Weekly pension system—Amount fixed by arbitration.

**Employers' Liability.**—It is a principle of law that any man guilty of negligence is liable to compensate any person injured thereby, provided that the negligence is the natural and direct cause of the injury. **Negligence** is a wide term, embracing so many different acts and omissions that it is impossible to enumerate them all. The words of the Book of Common Prayer aptly describe it: "We have left undone those things we ought to have done, and we have done those things that we ought not to have done." But the law has regard to things as they are, and prescribes as the standard of diligence



(the opposite of negligence) the conduct of a reasonably prudent man. It therefore comes to this: If you have left undone that which a reasonably prudent man would have done, or if you have done that which a reasonably prudent man would not have done, you are guilty of negligence.

It has been profanely said, more than once, in our Courts, that the "reasonably prudent man" has never yet been seen; he is a *lusus nature*—a monstrosity conceived by the writers of law books, and born of those who wear the ermine. As Mr. Cyprian Williams puts it,

"The prudent business man that never was on land or sea,  
But yet exists to shame us as an abstract entity."

There is yet another old-established principle, that he who acts through another, acts himself. To expound this principle is not a matter of difficulty. It means that if I want a house to be built, it matters nothing whether I myself erect the building, or whether I employ others to do the job. If that house obstructs the light of my neighbour's windows, or is put up so as to infringe the local bye-laws, I must compensate my neighbour, or pay the fine, as the case may be. So, if I employ a coachman to drive me to Lincoln's Inn in my carriage instead of taking the reins myself, I am liable to pay for the damage if he drives over the prehistoric apple-woman at the gate.

But suppose, after he has set me down at my chambers, and I have told him to drive home, he does nothing of the kind, but drives to a public-house in Drury Lane, and dismounts for purposes of refreshment. He leaves the horse untended the while—a thing no reasonably prudent man would do—and the horse is frightened and dashes up the street, knocking down people right and left. I am not responsible. Why not? Because the coachman was not acting on my behalf at all. He was off on a little frolic of his own, and so he alone is responsible.

It comes to this, then: that a man is responsible for his own negligent acts and omissions, and for the negligent acts and omissions of his servants when those servants are engaged in the course of their employment.

Now apply these principles to a case of this kind: Tom Jones and Bill Smith work for Thompson, the builder and contractor. It is Tom's duty to fill a basket with bricks and fasten it to a hook, whence Bill hauls it to the platform high up the scaffolding by means of a block and tackle. While Bill is hauling up one load, Tom makes ready another. All goes well until Bill, by careless handling, drops a whole basketful of bricks on Tom's head. Result: Tom has to be taken to a hospital, is laid up for six weeks, and will never be the same man again. To put the facts into legal form, Jones has been injured by the negligence of Smith, a servant of Thompson. You would naturally think, on the principle laid down in the preceding paragraph, of a masters' liability for his servant's negligence, that Thompson must compensate Jones.

But here another factor comes into play. Jones, as well as Smith, is the servant of Thompson. The person occasioning and the person receiving the injury are fellow-servants. Does this fact affect the position of the employer?

The answer is that it does ; for by the Common Law of the United Kingdom a master is not liable for injuries occasioned by one employee to another while the two are working in a common employment ; though he is liable to outsiders for his workmen's negligence.

This principle is called by lawyers **the doctrine of common employment**. It rests on the argument that a workman takes the risk of his fellow-servants' negligence—that is, so far as the master is concerned. Curiously enough, it does not matter what was the position of the negligent fellow-workman. He might be the foreman of the shop or manager of the works—to all intents and purposes a master ; in the eye of the law he was a fellow-servant with the sufferer. From 1837, when the doctrine of common employment was first enunciated by Lord Abinger, it continued in full force down to 1880. From 1862 the principle bore with increasing hardship on the working man ; for in that year was passed an Act by which people were enabled to form limited liability companies practically at pleasure ; and very many great industrial concerns passed into the hands of companies.

Now, it was, and still is, **possible to make an individual employer liable** for injuries to his workmen. Not often ; but still it has happened. For the doctrine of common employment never extended to the case of a master who had, by his personal negligence, caused an injury to a workman. It will be useful in this place to sum up the cases in which an employer is liable, quite apart from the Employers' Liability Act, which will presently be considered.

The first heading of this common law liability is, **when the master interferes with the work** and commits a negligent act by which the employee is hurt, the man can claim compensation. To take an example : Jones is a carpenter, working for Thompson. Thompson himself is a practical man, and himself takes a hand with his men. Some work having to be done on a scaffold, the master himself goes to do it, taking Jones with him to assist, and while the two are working together, Thompson carelessly knocks against Jones and precipitates him from the scaffold. Thompson is liable in damages, quite apart from the Employers' Liability Act.

A second kind of occasion upon which the workman has a claim is **when the master supplies improper or defective machinery** by which the man is injured. The reason is that to supply defective or dangerous machinery is in itself an act of negligence. But before the Employers' Liability Act it was difficult for the workman to recover anything under this head. I will tell you why. It was highly probable that the man knew that the machinery was defective just as well as the master ; and in that case he could get no compensation. The argument against him was, that it was just as negligent for him to work with machinery that he knew to be dangerous as it was for the master to supply him with dangerous machinery in the first instance. And even if the workman, as soon as he discovered the danger, told the employer of it and asked for it to be repaired, the master was not liable if he did not cause the necessary repairs to be made. All this is now altered by the Employers' Liability Act.



The third liability of the employer arose (and still arises) **if he engaged workmen whom he had reasonable grounds to believe to be incompetent.**

For example, suppose a Railway Company were to engage as an engine-driver a man who had had no previous training in that line—for example, if they put one of their booking-clerks to drive the engine, and on the first trip he forgot to blow off steam at the proper time, and so burst the boiler and injured the stoker, the stoker would have a good claim against the Company. Why? Because it is clearly an act that no reasonably prudent man would do, to set a clerk to drive a railway engine. It is, therefore, negligence on the part of the Railway Company.

These cases all amount to this: That for his own personal negligence the employer is liable by the Common Law, whether the person injured by that negligence be one of his own men or an outsider. But for the negligence of a servant the master is only liable if the person injured be an outsider, not if he be a fellow-servant of the wrongdoer engaged in a common employment with him.

Workmen will naturally ask, with some anxiety, **“What is a common employment?”** No difficulty arises when the man injured and the man who does the wrong are the employees of the same master, and are engaged on the same job. But difficulties do arise when the two men, though working for the same person, are not exactly working on the same job; and also when men, though working together, are not employed by the same master.

Take this case: Jones is employed by Brown & Co., contractors, to do a job in loading and unloading railway trucks at the Peddlington Junction of the Grand Trunk Railway. The trucks are brought up by an engine belonging to the Railway Company, driven by one of the Company's drivers. As the contractors' men are working about the line, it is the duty of the engine-driver to blow his whistle when he is approaching the place of unloading; but he omits to do so, and knocks down and injures Jones. When Jones takes action against the Railway Company, they reply: “You and the driver were engaged in a common employment. You were both taking part in the job of unloading trucks. Therefore you can claim no compensation from us.” Such a case did happen once, and the Railway Company defended themselves on the grounds stated. But it did not convince the judges who tried the case. Lord Esher said that to allow the principle of “common employment to apply, there must be not only a common employment, but a common master.”

Still, the point was not considered finally settled until the case of Johnson was decided in the House of Lords in 1891. This case is so important, as illustrating a state of things of the most frequent occurrence, that I set it out at length. Blank & Co. were builders, who had contracted to erect certain houses. These houses were to have fireproof floors, and Blank & Co.'s contract said that they were to provide £213, to be paid to Lindsay & Co., who were to provide and fix the flooring. At the proper time, Lindsay & Co. sent their men to put in the fireproof flooring. At the time this job was being done, Blank & Co. also had a number of men working on the building, amongst whom was Johnson. The two sets of men came into contact a good deal, as was only natural, and one day one of Lindsay & Co.'s

men injured Johnson: the injury was caused by negligence. Upon this, Johnson sued Lindsay & Co. for damages; but Lindsay & Co. set up in defence that their man, whose negligence caused the harm, was in a "common employment" with Johnson, because, said they, both men were working on what was practically the same job—namely, the erection of the houses. "But," replied Johnson, "how can you call it a common employment when we had not a common employer? I was working for and paid by Blank & Co., while the other man was working for and paid by you (Lindsay & Co.)." The case was of such importance, that when the Court of Appeal decided against Lindsay & Co., they carried it to the House of Lords, in order to obtain the highest and most authoritative pronouncement of the law. And the House of Lords promptly confirmed the decision of the Court of Appeal, thus settling once and for all that to make "common employment" there must be a common employer. Therefore, if you are working for Jones and are paid by him, and Thompson is working for and is paid by Smith, though you are labouring at the same job, and Thompson carelessly does something by which you are hurt, you can make Thompson's employer pay you compensation. The right is quite apart from the Employers' Liability Act.

#### LIABILITY OF MASTER UNDER THE EMPLOYERS' LIABILITY ACT.

It might have been just as well, while the Legislature was in a reforming mood, to abolish the doctrine of common employment for good and all. But this is not, and never has been, the British way. The British way is to proceed cautiously: never enunciating a principle in an Act of Parliament—only dealing with particular instances of mischief.

The Employers' Liability Act, 1880, merely extended the liability of employers in two directions as regards most classes of workmen, and in one more as regards railway servants. At the same time, the Statute imposes certain restrictions on the amount of the compensation, and on the class of workers entitled to the benefit of the Act. Moreover, a workman who has been injured, and who wishes to prosecute his claim, must take care to follow closely the rules laid down by the Act as to the manner in which he is to proceed. I will deal with the subject in this order: (1) Persons entitled to claim compensation from the employer; (2) against whom compensation can be claimed; (3) the injuries for which the Act provides compensation; (4) when and how compensation must be claimed; (5) what amount can be claimed; (6) contracting out, and other defences of the master.

And first, **Who are entitled to claim compensation?** The answer is, **Railway servants and workmen.** The term "workman" is a term to which a special meaning was given by the Employers and Workmen Act, 1875. I have already told you (p. 813) who the persons are who come within section 10 of that Statute. For the sake of convenience I will tell you again here: "Any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in *manual labour*, whether under twenty-one years or not"; but not domestic or menial servants (*see* Book I., Chap. IV., pp. 94-5), and not seamen, or apprentices to the sea service.



The keynote is manual labour; and although in most cases the question is an easy one to decide, yet it is not always possible to pronounce at once whether the worker is engaged in manual labour or not. In Scotland, the Court of Session decided that a tram conductor in the employ of the Glasgow Tramways Company was a "workman," and entitled to the benefit of the Statute. The English Court of Appeal, on the other hand, quite as emphatically decided that an omnibus conductor in the employ of the London General Omnibus Company was not a "workman." Their lordships were of opinion that the conductor's real and main work was the collection of fares, and that this was not "manual labour."

On the other hand, the same English Court held that a wharfinger's carman was a workman. It was proved that his duty was not only to drive, but to load and unload his cart. But if his work had been merely to drive the lorry, he would not have been a "workman"; for driving a vehicle is not, according to the English decisions, manual labour sufficient to bring the driver within the Act. A tram-driver in the employment of the North Metropolitan Tramways Company was held not to be a "workman." The reader is referred to page 813 for further instances.

As to railway servants, the case is quite different. The Employers' Liability Act expressly includes them all, whether they are engaged in manual labour or not. Thus, station-masters and clerks of a railway could take advantage of the Employers' Liability Act, though the clerk of (say) a tramway company could not.

When a workman is killed, his relatives can claim such benefit as the workman himself could have claimed had the accident not been fatal. But this claim is not one under the Employers' Liability Act. It arises partly under that Statute, and partly under another, known as Lord Campbell's Act—an enactment having for its parent the author of "The Lives of the Chancellors," of whom it was once said that it was sufficient to deter anyone from aspiring to the woolsack, when he knew that Campbell would write his biography. Campbell's Act was destined to remedy one of the anomalies of the Common Law. It used to be the case in England that if a man lost his life through the negligence of another, the dead man's relatives had no right to compensation. The Act provides that when the death of a person is caused by some wilful act or by negligence, an action shall lie against the wrongdoer, provided that the dead man would have been entitled to compensation had he merely been injured.

An action under this Act must be brought within twelve calendar months after the death of the person killed. It should be brought by the dead man's executor or administrator, if he has one; but the executor or administrator does not count the money as part of the deceased man's estate. That is to say, it does not go to pay debts, or anything of that kind. The sum awarded goes for the benefit of the wife, parent, and children of the slain man. Children includes stepchildren and grandchildren; parent includes stepfather and mother, and grandparents.

Now, it generally happens that a workman leaves no will, and consequently

has no executor. His belongings also are small, so no one takes out administration of his estate (*see* Book V., Chap. III.). In that case, any of the people mentioned in the last paragraph can begin the action. They must not, however, bring more than one action. That is to say, the dead man's parents must not bring one action, his wife a second, and his children a third. They must all join in the same proceedings, and leave it to the jury to divide the compensation amongst them. Thus, I heard a case a few days before this was written, in which a workman's widow brought an action of this kind on account of the death of her husband. The poor fellow had been ordered to climb up a rope, when he ought to have been provided with a rope-ladder. After working for about fifteen hours he slipped in going up the rope, fell, and was dashed to pieces. He had only been married a few months, and his young widow gave birth to a posthumous child. The jury found the employers guilty of negligence, and awarded £500—£350 to the widow, and £150 to the baby. The youngster's portion was directed by the judge to be invested for his future benefit—the usual practice in these cases.

Sometimes a workman leaves an executor or administrator, but that officer declines to bring an action for compensation, or neglects to do so. In such a case, as soon as six months from the death have elapsed, the parent, wife, or child can bring the action, as detailed in the last paragraph.

While I am upon the subject of fatal accidents, let me say that the law does not give the wife, parent, or child the right to bring an action merely because their relative has been killed. **Only pecuniary loss can be recovered.** Thus, if I have a son who works for a shipbuilder, and he receives a fatal injury through some negligence for which his master is liable, it does not follow that I can get any compensation from the master. It may well happen that I have sustained no monetary loss by the melancholy event, and the law gives me nothing for the shock to my feelings. Nor are the damages allowed by Campbell's Act intended as a punishment to the wrong-doer. They are only compensation to the relative; and compensation implies that a loss has been suffered. Now, if my son was in the habit of contributing to my support, I can properly claim compensation. Even if there was a **reasonable expectation** of pecuniary benefit, I can recover.

Thus, young Hetherington worked for the North-Eastern Railway Company; and met his death in circumstances which would render the North-Eastern Railway liable for negligence. Hetherington's father sued the Company for compensation. Asked what pecuniary loss he had suffered, he replied, "About five years ago I was in bad health, and my lad contributed to my support."

"Was he allowing you anything at the time of the accident?"

"No. But I know he would have done so at any time when I was ill or out of work."

Lord (then Mr. Justice) Field said that this was good enough. There was, as he put it, a reasonable expectation of pecuniary advantage to the father from the life of the deceased. And so Hetherington, senior, obtained a small sum of money.



A widow and a young child have always a good claim. A parent generally has ; because the mere fact of the relationship gives a parent a reasonable expectation of pecuniary assistance in his old age or failing health. But when the parent is pretty well-to-do, so as to render it highly improbable that he would ever need assistance, he would not be well advised to sue the employer. This, however, is of the rarest occurrence amongst working-class folk ; and it is fairly safe to say that the parents of a workman (which includes woman, boy, and girl) fatally injured by the negligence of his employer, or in any of the ways for which the employer is liable, will succeed in extracting damages from that employer. I need hardly say, perhaps, that the mother has as much claim as the father, for she would have been quite as likely to become dependent on the child's bounty as he.

In Scotland there is no Lord Campbell's Act, because never was need for it. There, if anyone kills me through his negligence, my dependent family can claim compensation just as I myself could have done had I only been injured.

The next question for discussion is, **Who is liable to pay compensation?** This resolves itself into the question, "Who is the employer?" There would seem not to be much difficulty about this at first sight ; but I have seen quite enough employers' liability cases to know that you cannot always discover at the first glance who a man's employer is. Especially is this so in the case of dock labourers, and in all cases where work is given out, as it were, by the lump. One very good test is to ask, "Who pays the man's wages?"—a matter that can usually be discovered pretty easily—and on finding the wage-payer, go for him. But this test is not always conclusive ; for you may be paid by Jones, but still be, for the time, my workman.

To take a case : The White Moss Colliery Company had begun to sink a shaft in their colliery ; but after proceeding a little way with it found it would pay them better to hire a contractor ; and so they entered into a contract with Roger Whittle that he should, for a fixed sum, finish making the shaft. The Company had already fixed up an engine to work a crane, that was to be used for hauling to the surface the soil excavated ; and this engine they had placed in charge of Ellis Lawrence. When Whittle took over the job he was allowed to use the engine, and the Company also turned over to him the services of Ellis Lawrence, the engineer. Lawrence continued to be paid by the Company, but had to obey the orders of the contractor, Whittle ; and was placed entirely under the control of Whittle for the time being. It was decided that although Lawrence was the general servant of the Company, because they paid him, yet while working under Whittle's sole command he was to be regarded as Whittle's servant.

I particularly wish you to notice that a man does not become my servant when his master lends him to me unless he is, for the time being, and for the particular job, completely at my disposal—just as much at my disposal, in fact, as though I had hired and paid him myself.

From this you see, and that is what I want you to see, that **the man who pays the wages is not always liable**, because the workman may be, for a time, actually working for and under the orders of another (or special) master.

On the other hand, for the purposes of the Act, a workman may be in the employment of someone who does not pay him his wages, so that if an injury be done to him while in this person's service (though not in his pay) he must demand compensation under the Act, if at all. I have already told you that if there is no "common employment"—that is, if the workman who is injured is not in the same service as the man who injures him, the injured man has a claim quite apart from the Employers' Liability Act (*see* pp. 836-7). But, as I shall show you, the causes for which a man may take action under the Employers' Liability Act against his employer are not so wide as those for which he could take action for negligence against any other person; and, moreover, the employee must go about it in a very different fashion.

A second case of difficulty in answering the question, "Who pays?" arises in those numerous classes of cases in which work is sub-contracted for. Take **the case of a stevedore**. A ship comes into a dock and the Dock Company engages to unload her. Accordingly, the Dock Company engages a man who undertakes to do the job for so much in a certain time. This man "takes on" the number of men whom he judges necessary for the task—paying them, probably, sixpence an hour. His profit is made by farming the labour of these men, and he is generally, though not always, a man in a small way—what lawyers call "a man of straw"—that is, someone not worth bringing an action against, because he cannot pay if he loses. Now, suppose one of the labourers engaged by this person is injured by the negligence of the foreman while unloading the ship. He naturally wants compensation; and it becomes of the utmost importance to him to inquire, "Who is my employer? Was it the man who 'took me on,' or was it the Dock Company?" For in the one case he has something substantial to carve at; in the other, he might as well grin to the best of his ability and bear his misfortune.

The way to answer the question is this. Ask yourself, "Did the man who engaged me retain the rights of an employer while the work was being carried out?" To put it another way, "Was I bound to obey his orders, and the orders of nobody else; or was I bound to obey the orders of the officials of the Dock Company?" Or, "Who had the real control of the unloading of the ship—the Dock Company or the sub-contractor?" If the former, then they were the real employers. If the latter, then he is the employer.

It is a shocking but undoubted fact that many **Dock Companies and contractors endeavour to evade liability** by letting out jobs in this way to sub-contractors. And sometimes, one is sorry to know, the attempt is successful. But not always. A great fight was waged not long ago between the London Dock Company and their workmen. The London Dock Company was (and, I daresay, now is) in the habit of making contracts with some of their workpeople for the unloading of the ships coming into the London and St. Katherine's Docks. The contract always ran in these terms:—Jones (the "ganger") undertook to discharge the cargo of such-and-such a ship for so much a ton. He was to engage a gang of men for the purpose out of the men who are daily admitted into the docks by ticket obtained from the Dock Company. He was to pay the gang, and to use the Company's gear and



machinery. Jones, the contractor, or "ganger," was himself merely a workman of the Dock Company, whose name appeared in their books as a workman; and it was proved that he used to go to the Company's superintendent and ask for directions when he was in doubt as to what to do.

A man named Levering, who was taken on by one of these piece-workers, was hurt while assisting to unload the vessel, and he took action against the Dock Company for compensation under the Employers' Liability Act. "Not so," said the Dock Company, "we are not your employers. Jones is your employer. He pays your wages. He engages you. And to him you must look for compensation." "That's all very well," replied Levering, "but you don't catch me trying to shave an egg. I should be most happy to have a shot at Jones, but he is not worth it. Moreover, you (the Dock Company) were my real employers, because (1) Jones could not have taken me on unless I had previously obtained your admission ticket. Therefore Jones was not an independent master; for an independent master is not restricted in his choice of the men he engages. (2) Your superintendents often interfered with the work, and said to Jones, 'Do this thing this way, and that thing that way.' (3) Jones was your workman. He was, in fact, your foreman, and was all the time under your control."

These arguments carried the day, and the London and St. Katherine's Dock Company were compelled to pay Levering fair compensation for the injuries he had received while working in their service.

**Colliers and the "butty system."**—All colliers know what the "butty" system is. Buttymen are colliers who form a kind of partnership and take over from the management of the colliery a certain area of coal. The agreement is, "We, the buttymen, undertake to get and raise to the pit-bank all the coal within the particular area at the price of so much a ton." Then the buttymen engage other colliers to work for them, pay them their wages, and give them their orders as to how long they shall work, and so on. You might easily think that the men working under the buttymen were the employees of the buttymen and not of the Colliery Company. But generally it is not so. Generally the Colliery Company is the real employer and is liable as such. In an action brought by one Brown against the Butterley Coal Company, it was decided that the Company was liable as employer, though Brown had been engaged by buttymen. In this case one of the rules of the colliery was, "Every workman shall obey strictly all orders of the overman, underlooker, bailiff, or other officer of the Company"; and it was further proved that both the buttymen and those engaged by them were equally subject to these rules. This was enough to enable the Court to hold that they were all alike in the service of the Company, and that the Company was liable to all of them under the Act.

We now come to the question, **For what acts and defaults is the master liable under the Act?** With regard to workmen in general, the Act gives four heads of liability—with an additional one specially for railway servants. The first is, when the accident happens, "By reason of any defect in the condition of the ways, works, machinery, or plant connected

with or used in the business of the employer." With this section must be read subsection (3) of section 2 of the Act, which says, "In any case **where the workman knew** of the defect or negligence which caused his injury, and failed within a reasonable time to give or cause to be given information thereof to the employer, or to some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of the said defect or negligence, the master is not liable."

Let us see how this works out. Orkins is in the service of Beanpea & Co., builders and contractors. Not to put too fine a point on it, as somebody says in the story, he is a bricklayer's labourer, and carries bricks up a ladder in a hod. The ladder is a defective one, owing to its having been broken and not properly mended. Suppose (1) that Orkins does not know the ladder to be defective. It breaks while he is on it, and he is injured. Beanpea & Co. are liable to pay compensation to him. Suppose (2) that Orkins observed the ladder to be defective, but said nothing about it to anybody. When Orkins makes his claim for compensation, he will be bowled out, middle stump, first ball, unless he can show that the reason he did not call attention to the defect was because he knew that his employers, or the foreman, or some other person in authority, already knew. In other words, it is a workman's duty to give warning as soon as he discovers a dangerous defect in the "ways, works, machinery, or plant." His only excuse for not doing so is that he knows such a warning has already been given by someone else. It is not enough for him to show that the masters (or other superiors) actually knew. He must show that he knew that they knew. Mind, he need not show that the employer himself knew. It is enough to show that the defect had been brought to the notice of a superior fellow-servant—such as an overlooker, foreman, ganger, or man in charge of the job.

Let me further point out that the master is not liable for every possible defect in the "ways, works, machinery, or plant." He is **only liable if the defect was caused by the negligence** of the employer himself, or someone in his service, or else it was a defect which ought to have been discovered by the employer or one of his servants, and would have been discovered but for their negligence. What does this mean? It means that if there was some defect in a machine which no ordinary care could have discovered, the master is not responsible. Thus, a man named Seeley worked in Mr. Jackson's engineering shop in Sheffield. One day he was conveying a heavy casting on a "bogie" [two-wheeled skeleton carriage], and in the course of the performance the bracket, fastening the hind wheel to the "bogie," broke, and hurt Seeley rather badly. He promptly claimed compensation, but didn't get it. Why not? Well, just because the breaking of the bracket was one of those things that no one could have prevented. It was due to a flaw in the metal—a totally invisible flaw, because it was inside. The "bogie" in question had been used scores of times to carry heavier weights than the one put on it by Seeley; and no one had dreamt that there was anything the matter.

In other words, a master is not liable simply when a defect in his machinery causes an accident; but only when he has not taken all reasonable precautions



to prevent and discover the defect. For instance, a baker of the name of William Alexander Fraser, of Aberdeen, was engaged in erecting for his bakery one of those ugly tall chimneys so well-known to dwellers in manufacturing centres. Mr. Fraser was a versatile sort of man; for besides being an excellent baker he knew enough to be his own architect, and his own building superintendent. When the chimney was up, he hired another Fraser—Alexander Fraser of that ilk—to put up a lightning conductor. In order to enable the “steeple-jack” to work, he had to be provided with a stout rope; wherefore the worthy baker supplied him with one borrowed from a neighbour. The baker had already used the rope for three days in hauling up the cope-stones, which weighed 2 to 3 cwt. apiece, and in this work some of the centre strands had broken. This “nip,” as it is called, could have been detected by a skilled hand, but Baker Fraser was not skilled, and so he set Steeple-jack Fraser to work with the defective rope. Result—the climbing man fell head first. He was dead when they picked him up, and his father brought an action against his employer, the baker, and recovered £150 damages. The rope ought to have been properly tested ere it was allowed to be used by the steeple-jack.

**What is a defect in the condition of ways, works, machinery, or plant?**—In the first place, if a machine, though good in itself, be unfit for the purpose for which the workmen are to use it, that is a defect in condition. For instance, Messrs. Samuelson & Co., ironmasters, had a lift—a most excellent lift, in splendid working order. But they used it for carrying coke and did not trouble to fence the sides. Consequently, a lump of coke fell on one Heske, a workman, and killed him. The Court held that Samuelsons must compensate Mrs. Heske and the little ones for the loss of the breadwinner; because an unfenced lift is dangerous when used as a conveyance for loose stuff like coke.

So also Judge & Co., builders, erected scaffolding and supported one end on a ladder. The ladder had not only to bear the weight of the scaffolding and the men standing on it, but was also used as a means of ascent and descent to the top of the building. Young Cripps was descending, when the ladder broke. It was a good ladder, said their lordships, but not fit to prop up a scaffold with and be used at the same time as a ladder. Wherefore Cripps received £15 to buy plaster for his bruises.

One more illustration, and I have done with this part of the Act. Richard Welsh was a navvy in the employ of James Moir, contractor, Dalkeith. Moir contracted to take up a private railway belonging to the Marquis of Lothian, and, in order to save time and labour, he employed a travelling steam crane, the hook of which was attached to the rails, and then the crane raised both rail and sleeper. After a while, the pivot of the crane, meeting with unexpected resistance, broke, and the jib fell on the head of poor Richard Welsh and killed him. It was held that it was not a proper use to put a steam crane to—namely, to tear up a railway line and sleepers—because you don't know how much weight you are lifting, and a crane is constructed to lift a definite weight. So Welsh's widow obtained £100.

A defect in the “ways” means a defect in the material thing itself upon

which the workman goes—it does not mean merely an obstruction placed in the way. For instance, Thomas McGiffin was employed at Palmer's iron-rolling mills at Jarrow, and it was part of his duty to wheel along a tram-line a "bogie" filled with balls of white-hot iron. One day a careless scoundrel of a labourer, without being told to do so, threw down some pieces of piping on the rail, and the next time McGiffin came along, his "bogie" was jerked, and a piece of molten iron dropped on him. It killed him. Messrs. Palmer, however, were held not responsible, because there was no defect in the tram-line—there was only a temporary obstruction, placed there by someone for whom they were not responsible.

**Is a machine defective because it is dangerous?**—This is another question frequently raised in one form or another. And one must remember that it is almost impossible to have a machine **without** the possibility of danger. Even my razor is dangerous—in a sense. It is dangerous, that is, if I do not handle it properly, for I may easily cut my throat. And the sharper the razor, the greater the risk of a cut. Still, nobody would dream of saying that a razor extra sharp was defective. Now a machine is defective by reason of its dangerous character if it is dangerous to a workman who properly understands its working and is skilled in the use of it. As Lord Esher put it in one case, "If the machine were dangerous to a workman, without any fault of his own, it came within the Act." And in this way it happens that a machine, perfect in itself, and most admirably adapted to accomplish its work, may be defective within the meaning of the Act if it has a wheel unfenced in such a position that the man feeding the machine is likely to be injured by it.

The second case of compensation provided by the Act is when the injury is caused by the **negligence of a fellow-servant who is a superintendent**—provided that the negligence occurs whilst he is exercising his superintendence. The third case is very similar, namely, when the injury is caused by the **negligence of a fellow-servant to whose orders the injured man was bound to conform, and did conform**; the injury must have resulted from the injured man having conformed to the orders of the fellow-servant in question. Be careful, please, to remember that the general superintendent of a Railway Company is a fellow-servant of every porter on the line, for they are alike in the Company's service; and so with the managing director of a Shipbuilding Company and a journeyman boiler-maker employed in the yard.

Now the two cases given above practically amount to this. There are two kinds of persons at whose orders a workman may be. There is the manager or the regular foreman of the shops, who is a **permanent superintendent**. Then there is the ordinary fellow-workman who is occasionally put in charge of a job, but who has no regular permanent job of superintendence. The 8th section says that the fellow-servant who is a superintendent must be one whose usual or principal duty is superintendence. He is, in fact, a general superintendent. The other is a superintendent for a particular occasion.

The **distinction is important** to workmen for this reason. If a general superintendent gives a negligent order to Jones, and Jones, in executing it,



injures Smith, Smith has a claim on the employer, because, in the words of the Act, the injury happened "by reason of the negligence of a person in the service of the employer who has superintendence entrusted to him whilst in the exercise of such superintendence." But if the negligent order were only given by a special superintendent, the employer might not be liable to Smith. For example:—Almost every railway carman has a boy who goes about with him in his van to assist him, the boy being under the orders of the man—"bound to conform to his orders or directions." But this boy is the only person over whom the carman has any authority. His usual or principal duty is not to give orders, but to load and unload and drive his van. Now take three cases of accident, and see the results:—

(a) While the van is being unloaded at the goods station, the man tells the boy to cut a certain rope by which goods are tied to the top of the van. This order is a negligent one, because the goods, being loosed suddenly by the cutting of the rope, are liable to tumble off. They do tumble off, and fall upon the boy, and the boy is hurt. He can come upon his employers, the Railway Company, for compensation under the Act, because his injury was caused by obeying the order of a fellow-servant whom he was bound to obey.

(b) The same facts, except that the goods tumble upon a railway porter who is passing at the time. The porter has no claim, because the injury did not happen because *he* was carrying out the orders of a fellow-workman whom *he* was bound to obey. For (1) he was not carrying out the orders of the carman; (2) he was in no way bound to obey the carman if the latter had given orders to him.

(c) The van is standing in the yard, waiting to be unloaded, when the superintendent of the goods station passes by. He tells the carman and his boy to be sharp and set about the unloading, and he stands by and superintends operations. "Cut that rope!" he calls out to the boy, and the boy obeys. Result—down fall the goods from the top of the van, crash upon the head of a goods porter who is coming up to ask for orders. The Railway Company is liable to the porter, because the order to cut the rope was a negligent act of superintendence upon the part of a person who has superintendence entrusted to him—a general superintendent, or man whose principal business it is to superintend.

You will notice that the negligent act of the general superintendent must arise "whilst in the exercise of superintendence," or else the injured man has no case. Fortunately for workmen, there is a tendency in the Courts to construe the words of the section liberally in favour of the man who has been hurt. Thus, Osborne was a bricklayer, working upon a building for Jackson and Todd. A foreman carpenter in the same employment, who was a general superintendent, whose principal duty was to give orders and to superintend, said to Osborne, "Catch hold of the end of this plank." Osborne obeyed. Now the foreman, when he gave Osborne the end of the plank to hold, was on a scaffold above Osborne. He let go the other end of the plank, and the bricklayer was unable to hold it up alone, so that it fell and injured him. The Court of Queen's Bench decided that the foreman had been negligent

"in the exercise of superintendence," because, if he had told another to do what he himself did, it would have been a negligent order.

As to an injury caused by obedience to a negligent order or direction on the part of a special superintendent, the **"order or direction" need not be one given in words.** Thus, a boy named Millward was employed by the Midland Railway Company as a carman's boy. The carman and the lad Millward were unloading a cart, which had in it three iron frames tied together. The man untied one end of the string. The lad Millward untied the other, without being actually told to do so, but according to the way in which the carman had always ordered him to do it before. The man lifted one of the frames, and let go the other two—he ought to have tied them up—and they both fell upon and injured the boy. The latter recovered damages against the Midland Railway Company, because his injuries resulted from having conformed to orders of a fellow-servant to which he was bound to conform.

It comes to this, then, that if you are hurt by the negligence of a permanent "boss," who ranks as a commander, it matters not whether he improperly ordered you to do something and you were hurt in doing it, or whether he negligently ordered Bill Smith to do something, and Bill, though doing his best, hurt you. In both cases the employer pays. On the other hand, if the negligence is that of a temporary or very limited "boss," like a "chargeman" at an engineering shop, or a journeyman bricklayer (who is "boss" over the bricklayer's labourer), or the steady hand who is sent for the day in charge of the gang of navvies, the workman can only come upon his employer if he himself is injured in obeying the commands which he was bound to obey.

It is **not every command that a workman is bound to obey.** For instance, if the foreman tells him to do what a foreman stevedore ordered a man to do in a case reported in Mr. Ruegg's valuable book on Employers' Liability. One of a gang of stevedores, working in the hold of a ship, was not performing to the foreman's satisfaction. Said the foreman to another labourer who was on deck, "Get hold of a block of wood and drop it on his head." The fool dropped it. It was held that the injured man had no claim against the employer, because the order was not one which the labourer ought to have obeyed; for no one has any business to commit a wilful injury, no matter who tells him to do it.

The fourth kind of injury for which compensation can be exacted is when the injury is caused by **any person in the service obeying the rules or bye-laws of the employer when there is some impropriety in such rules or bye-laws.** But it is to be noted that when a rule or bye-law has been approved by the Board of Trade, or one of the Secretaries of State (*e.g.* the Home Secretary), or by any other Government department, by virtue of any Act of Parliament, such a rule or bye-law is to be deemed a proper one. For example, the bye-laws of Railway Companies have to be sanctioned by the Board of Trade before they can take effect. The Home Secretary has power to sanction bye-laws and rules in coal and metalliferous mines. Under the Alkali Act, the Local Government Board may sanction rules regulating the conduct of workmen engaged in dangerous parts of the work carried on in an



alkali manufactory. In all the cases mentioned, it is hopeless for a workman to complain of being injured through carrying out the rules or bye-laws so sanctioned by these Government departments.

I have never met with, nor have I ever heard or seen reported, a case under this section. It would apply equally when the injured man was himself obeying the defective rule and was hurt in consequence of his obedience, and when someone in obeying the rule injured someone else.

The fifth actionable cause of injury is **injury caused by acting "in obedience to particular instructions** given by any person delegated with the authority of the employer in that behalf." In my opinion, this subsection has no effect at all. If it means that the fellow-servant who gives the instructions is merely the mouthpiece of the employer—*e.g.* Master says to Bill, "Tell Tom to do so-and-so"—then the employer is liable at Common Law, without the Act; because the command is a personal command from him, just as much as if he wrote it on paper and sent the paper to Tom. If it means anything else, I have not been able to find out, and I cannot find anyone else who has been able to find out. Possibly it is a clause slipped into the Act by the exertions of some over-zealous, but ignorant, Member of Parliament who did not know that the employer had any liability to his workmen by Common Law. Clauses very often are slipped into Statutes in that way. The M.P. in charge of the Bill says, "Rather than trouble about it, and waste time in explanations, I'll accept this amendment. It has no effect in any case, and though it cannot do any good, neither can it do any harm."

And now for a **bit of law for railway servants**, the most useful, civilest, and most trustworthy set of men who serve the public. Before the Act it was impossible for a railway servant who was injured in his employment to obtain compensation, because the lines are always worked by Companies, and a Company cannot be guilty of negligence except through its servants. And as a station-master was a fellow-servant of the humblest goods porter, and as an employer was not liable for injuries caused to one servant by the negligence of a fellow-servant, you can see the evil plight of the goods porter if his superior compelled him to do something by which he was injured. Now the railway servant has the benefit of those sections of the Act previously explained and expatiated on. But he has a further remedy still; for, if injury happens to him **caused by a person having control of any signal, points, locomotive engine, or train upon a railway**, he can demand reparation from the Company.

Observe the words "upon a railway." **What is a railway?** Mr. Firbank was a contractor employed by the North-Eastern Railway to make a piece of a permanent line. To facilitate the work he laid down a temporary line of rails, along which he ran a locomotive and trucks wherewith to carry materials to the work and rubbish away from it. The engine-driver neglected to blow his whistle, and ran over a labourer named Doughty, also in the employment of the contractor. Mr. Firbank had to pay, the Courts holding that the temporary line—which Firbank said was only a tramway—was a railway in the

broad popular sense of the word. So that "railway" does not necessarily mean a line worked by one of the Railway Companies.

Now let me deal as concisely as possible with other points raised by the Railway Companies when it is sought to render them liable under this particular subsection. In the first place, let us consider injury caused by a person having the control or charge of signals and points. The two words "control" and "charge" are very much alike in meaning, but you must not think that there is no difference at all. You see, from a legal point of view, you are always bound wherever it is at all possible by every word contained in an Act of Parliament. And so, though common-sense would compel us to say that a person having the control of points or signals is exactly the same as a person having charge of them, legal verity compels us to believe that they are different persons entirely. This is the result of being compelled to believe in the wisdom of Parliament as expressed in its enactments. And so the Court of Appeal had to hold that "charge" meant the general charge of the points, whilst "control" meant the temporary charge.

**In order to make the Company liable** it is not enough to show that the person causing the accident had something to do with the points; you must also show that he is the person who really regulates their working. For instance, a man in the employ of the Great Western Railway, whose business it was to clean, oil, and mend the points and gear at two or three places on the line, most negligently left the cover of the points which he had been oiling projecting over the metals. Result: a slight smash up, in which another railway servant—one Gibbs—was hurt. It was held that he had no claim under the Act, because the points were moved and worked from a signal-box by pointsmen. The careless fellow who caused the damage was no more in charge or control of the points than a man who oils the axles of a train can be said to be in charge or control of the train.

**What is a locomotive engine?**—I should have thought that there could be little doubt as to the answer to this question. But Mr. Murphy, or the ingenious lawyer who ministered to his legal wants, contrived to raise a point upon it. The said Mr. Murphy was working upon a line, when he was injured by the negligence of an engineer in charge of a steam crane. This crane was fixed upon a trolley, which could be and was moved about along a set of rails backwards and forwards from the place where the crane took up its load to the place where the burden was deposited. "This is a locomotive," Mr. Murphy contended, "for it is moved about along the rails by self-contained steam-power." But two judges of the Court of Queen's Bench, to use the words of a once popular song, "winked the other eye," and softly murmured that the word "locomotive" used in the Act was to be understood in its popular sense.

**What is a train, and who is a person having charge or control of a train?**—The Great Western Railway Company had at their station at Paddington some short lines of rails used to shift trucks from one line to another. The trucks to be shifted are run down the line on to a turn-table. The man in charge of the turn-table, by putting his foot on a treadle, sets in motion a



capstan, by which the turn-table bearing the truck with it is moved to another line of rails. On the occasion in question, the capstan man, having shifted six trucks and coupled them together, started the lot down the line, where a man named Cox was working. No warning was given; Cox knew nothing of the descending trucks until the foremost one knocked him down, and, I need hardly say, hurt him considerably. When the poor fellow sent in his little claim, the Great Western would have none of it. "Oh," they said, "this was not a train. And if it was, the capstan man had not the charge or control of it." So Cox had recourse to law, and with results quite satisfactory to himself. For the Court decided that a number of trucks coupled together, even without a locomotive attached, was a train; and that as the capstan man was the proper person to start them or stop them, to send them this way or that, he was in control. I have known more than one case of the kind since in the County Courts, and the Companies have never set up either of these points.

It may interest some of my railway-men readers to know that Sir Hardinge Giffard, afterwards Lord Halsbury, the Lord Chancellor, tried hard in the House of Commons to abolish the doctrine of "common employment" altogether so far as it related to the employees of Railway Companies. His proposed amendment would have made a Company liable for an injury to one of its servants inflicted through the negligence of any other fellow-servant, on much the same lines that a Company is liable for injury to a passenger. But this amendment was too sweeping for the House of Commons of those days, and the subsection upon which I have just commented—proposed by Mr. Samuel Morley—was carried in its stead.

Having thus, I hope, made clear to you the scope of the Act, so far as it relates to the matters for which compensation can be claimed, I come to the question, **When and how must compensation be claimed?** The Act is very strict as to the when and the how—a strictness productive of considerable hardship in many cases, but doubtless intended by Parliament to operate in the best interests of master and man alike.

The first thing to be carefully observed is that **notice of the injury must be given within six weeks** of the accident. Time here is of the utmost importance; for if the workman fails to give his notice within the six weeks, he is entirely out of court and cannot get a sixpence. It is not necessary for the man himself to give the notice; anyone on his behalf can do it. Thus, his wife can write, "On behalf of my husband, William Smith, I hereby give you notice," etc.; and that is enough. Or a workmate can give notice on behalf of his friend, even without being asked to do it. The notice must be in writing; it need not be signed, but I advise you strongly always to sign it and to keep a copy. You can send the notice by hand to your employer, or give it to him personally, or leave it at his business address; but the best way is to send it by registered post, and take care to keep the post-office receipt. Please observe that it is necessary to give this express notice even though the employer knows all about the accident. Thus, a man named Keen was injured while in the employ of the Millwall Docks Company. One of the Company's

inspectors came round and took a note of the accident and of its cause. Then Keen's solicitor wrote, "I beg to give you notice of Keen's intention to apply for compensation for injuries, particulars whereof have been communicated to your inspector." This was decided to be a bad and insufficient notice under the Act.

I must add that when an accident is fatal, and the executor or widow or other relative of the dead man does not give notice within the six weeks, the judge at the trial can forgive the omission, if a reasonable excuse is offered for the delay.

Now let us consider the contents of the notice—a matter of great importance. It must state plainly and in ordinary language (a) the name and address of the person injured, (b) the cause of the injury, and (c) the date on which it was sustained.

If you look carefully you will see that I say, "the cause of *the injury*"—not the cause of *the accident*. Thus, it is sufficient if I say that the injury was caused "by the fall of a sack of flour which was being lifted by a crane." There is no need for me to go on to say, "The sack fell because the man in charge of the crane obeyed the order of the foreman to haul up. The order was negligent, because at the time it was given the sack was not securely fastened to the hook at the end of the crane."

The great thing is that the notice shall give sufficient information to the employer to enable him to make proper inquiries and defend himself if proceedings are taken. Provided this is done, the judge at the trial can brush aside slight irregularities, omissions, or defects. For example: "Mr. Stone, of 193, St. George's Road, Peckham, has consulted me with reference to the injuries sustained by him while in your employ on the 19th of November last. He is now, and has been for some time past, under medical treatment at Guy's Hospital as out-patient, particularly for the injury to his leg." It was decided in this case that although the notice was defective, because it did not state how the injury to the leg was caused, yet the judge had power to remedy that defect, seeing that the defect was not proved to have misled the employer or to have prejudiced him in his defence. As one of the judges said, the notice is supposed to be written by a person in a humble sphere of life, and you are not to look at it with the same strictness that you look at a legal document drawn by a lawyer.

Besides all this formality as to notice, **the action must be commenced within six months from the accident** which caused the injury; or in case of death, within twelve months. "Months" means calendar months, not months of four weeks each. This limitation of time is like the laws of the Medes and Persians; you may have been half killed by the negligence of the foreman or managing director, but unless you take proceedings within the six months you lose your rights under the Act.

The **place of trial**, or rather the Court, is the Civil Bill Court in Ireland, the County Court in England, and the Sheriff's Court in Scotland.

**How much can the workman recover?**—and when I say the workman, I include his widow, or children, or other relative entitled to compensation if



the injury proves fatal. It has been thought by many persons that Parliament ought to have left the ordinary rule as to "measure of damages" to apply. In an ordinary action for personal injuries caused by the negligence of the defendant (or his servants), the rule is that the injured party can recover (a) any actual monetary loss sustained, (b) any monetary loss that he probably will sustain, and (c) compensation for the pain and suffering he has undergone.

Thus, if I, a railway passenger travelling on the Mid-Western Railway, am hurt in a collision caused by the negligence of the engine-driver in starting the train without the proper signal having been given, I can make the Company pay me, under head (a) my wages for the eight weeks I was out of work in consequence of the accident, my doctor's bill, the amount it cost me to go a holiday to the seaside to recruit, the price of any extra nourishment (such as beef-tea or port wine) that I have had to take instead of my ordinary frugal fare. If I am hurt so much that I cannot follow my old business, but have to take to some other employment at which I shall not earn so much, I am entitled under (b) to compensation for that, too. And under (c) the jury can award me anything they like, in reason, to make up to me for the sufferings I have endured, and to compensate me for the loss of health and strength, if the accident has materially affected my health in a permanent way.

In an Employers' Liability action the damages are calculated on the same kind of plan, with this important exception—that **the workman can never recover more than three years' wages**. Perhaps this expression is hardly accurate. I should have said, that he can never recover more than the estimated earnings for three years before the injury of a person in the same grade, in the same employment, and in the same district.

A **very hard case** came under my notice the other day upon this point. An engineer, a skilled workman who ordinarily earned at his trade £2 10s. to £4 a week, was out of work for a little while. One day, tired of inaction (he was not a member of a union and had no pecuniary resources), he took a day's job as a bricklayer's labourer or something of that kind on a building. While working at this temporary employment he was severely injured by the gross carelessness of a man whose orders he was bound to obey. The poor fellow was practically incapacitated from heavy physical work for the rest of his days; and the only compensation he could get was three years' average wages of a bricklayer's labourer—not three years' earnings at his own proper trade. Had the rule been three years' average earnings of the man himself, he would have obtained nearly £500. As it was, I had to advise him to be content with £150.

Besides this, **there may be a deduction to be made**. As I have shown you already (p. 704), the "occupier" of a factory must see that his dangerous machinery is properly fenced, and if he neglects this precaution, and anyone is injured or killed, the master is liable to a fine of not more than £100. The Home Secretary may order this fine, or any part of it, to be paid to the injured man, or to the wife and family if the injury proved fatal. And in such a case, should an action under the Employers' Liability Act be brought,

there must be deducted from the sum awarded to the workman or his family anything paid to them under the above section of the Factory Act.

I now come to the last subdivision of the subject, namely, **Some defences commonly set up by employers to escape liability**; and first of all comes the defence that the workman has contracted out of the Act—that is to say, he agreed beforehand with the employer that the employer should be under no liability to him by virtue of the Act. It may not be generally known, but it is the fact that there is no mention of "contracting out" in the Act itself. But it is a rule of law that any person upon whom the law confers a benefit may, if he pleases, agree not to claim that benefit. The result is that you can contract out of any advantage given to you by the law, unless that law goes on to forbid contracting out.

The Employers' Liability Act had not been in force much more than a twelvemonth before a man named Griffiths, employed as a collier by the Earl of Dudley, was killed at his work, and his widow took action under the Statute against the noble lord. It was practically admitted that the injury occurred through circumstances which would have rendered Lord Dudley liable to pay compensation. But the noble employer set up this defence:—There was, he said, at my colliery, a club to which every workman contributed, and I paid in a sum equal to the total amount subscribed by the men. This fund had been in existence years before the Statute appeared, and all men injured at the colliery were entitled to benefit. If they were killed, their widows had a claim. As soon as the Act came into force, I circulated a printed notice amongst the men, to the effect that in future every man *must* contribute to the fund; that I bound myself to contribute as before; that every workman should look to the fund and not have any claim against me under the Act; and that this should be a contract between us. The High Court held that as Griffiths had seen this notice and consented to it, he had debarred himself and his relatives from all claim to compensation under the Employers' Liability Act. Probably if Griffiths had merely seen the notice posted up in the works, and had simply gone on with his work, and said or done nothing, the Earl of Dudley would have lost his case; because there must be a contract—or else there cannot possibly be contracting out—and a contract requires the consent of all parties who are to be bound by it.

It is not enough (in England and Ireland) that a workman should be asked by his employer, "Will you give up any right you may have against me under the Employers' Liability Act?" the workman saying "Yes." For this is a contract without any consideration, and in England and Ireland is not of any use whatever (pp. 276 *et seqq.*). But if the employer says, when he engages a man, "I shall not take you on unless you agree not to claim against me under the Employers' Liability Act," or "I shall get rid of you unless you agree," etc., and the workman thereupon consents to forego his right, there is a legal contracting out. The consideration is the continuance of the employment.

A second defence, which is also successful, is, **that the workman has accepted compensation already**. Thus, Jones is hurt through defective



machinery. The employer sends somebody to see him, who persuades Jones to take a five-pound note in full settlement of all claims. Very often Jones is persuaded to sign a receipt "in full settlement of all claims for compensation." It afterwards turns out that Jones is hurt much more seriously than he imagined. Nevertheless, he cannot get another penny. I strongly advise workmen who are injured not to accept proffered compensation too readily. Consult a solicitor, or the delegate or secretary of your union first. I have seen enough to convince me that these "fivers" are often a delusion and a snare.

A third resource of employers is the plea **that the fellow-servant who inflicted the injury was acting outside the scope of his employment.** If this is established, it is effectual to bar the claim. The matter may be put thus: if the negligent fellow-servant was engaged in his employer's business, though he was not doing the work in precisely the way he was told to do it, he is "within the scope of his employment," and the master is responsible for his acts. Thus, to take the case of the carman and his boy (p. 847). While they are on the round, the carman tells the boy to jump down while the lorry is moving, and do something to the harness. This is a negligent order; but the boy obeys it, is knocked down and hurt. The employer is liable, because although he never authorised the carman to give such a foolish order, yet the man was acting as his carman at the time, and was simply doing his work carelessly.

But suppose, after the round is over, instead of going straight back, the carman says, "I live a little way from here, and I will drive round and see my wife"; and while on the way, he gives the negligent order with the same result as before. The employer is not liable. Why not? Because the carman, while driving round to see his wife, was on a little errand of his own, and not employed in his master's business at all.

Then you have the defence **that the workman voluntarily took the risk.** This defence is not so good as it used to be, because judges are rather chary of saying that a man consents to run the risk of being hurt, perhaps totally disabled, or even killed. In fact, unless the employer can prove to the satisfaction of judge or jury "that the workman, knowing and appreciating both risk and danger, voluntarily encounters them," he will not take much by his plea. The common case is this:—There is a danger known to the workman. He complains of it, perhaps, and he is told that if he doesn't like the job he can go. He does not go. The threatened danger falls, and when the man tries for compensation he is told, "Oh! but you took the risk; because, knowing the danger, you remained to face it." Such was the case of *Smith v. Baker*, in 1891.

Smith was a workman in a railway cutting. Other men worked on a bank above him, and heavy stones were being continually raised by a crane from the cutting to the bank. In course of transit they were swung over Smith's head. Naturally he thought it dangerous, and complained of it as such; but he kept on working all the same. Finally, a stone fell upon him. He escaped with his life, but that was all, and then he asked for compensation. This was denied him, on the ground that he had voluntarily taken the risk of

5 cwt. of stone dropping on his head. Then he tried a persuader in the form of a summons, and the case went up to the House of Lords. Lords Halsbury, Watson, Morris, and Herschell had no doubt about it. "It is absurd to say," they remarked, "that this man consented to the risk, merely because he knew of it. So far from consenting, he complained about it. Was he to throw down his tools, run away, and lose his employment? Certainly not." So that the House knocked on the head the absurd notion that a man who merely knows of a risk consents to take it; and you cannot say that because he remained at work in a dangerous place he consented to take his chance of being hurt without claiming compensation.

The last of the common defences of the employer is, **that the accident would not have happened but for the workman's own negligence.** In other words, the employer says, "I admit that the foreman gave a negligent order," or "I admit that the machinery was unsound; but I say that nevertheless you would not have been hurt had you yourself not been foolishly careless in the way you carried out the order, or in the way you handled the machine." This is called the defence of "contributory negligence." Just as it sometimes happens in a lawsuit that you have two innocent parties, and hardly know how to say which of them is to bear the loss, so also you sometimes have two negligent parties, and you hardly know which of them is to blame for the injury.

Mr. Davies had a donkey, a sagacious beast, but addicted to roaming. Mr. Davies, being out one day with his ass, feeling the day very hot and himself very tired, selected a quiet road with grass and thistles growing at the sides, unharnessed his beast, and lay down by the roadside to sleep. But first he hobbled the donkey—that is, he tied its off hind leg to its near fore leg, so that it could not run away—and turned it loose to graze. As Davies slept, his faithful cuddy strayed into the middle of the road, and had not been there long when one Mann came along, furiously driving a horse and trap. Seeing the ass, Mann yelled at it, but the poor animal did not get out of the way any the quicker for that, merely because it could not. Mann yelled again, and, finally, in a fit of temper, whipped up his horse, drove straight into the donkey and knocked it down. Davies sued for compensation. Mann replied, "You were guilty of contributory negligence; for it was negligence for you to tie up your donkey in that style, and then turn him loose on the highway." In the end, the Court found for the donkey-man. He had, they allowed, been also guilty of negligence, but it was not his negligent act which finally brought about the damage. Notwithstanding the tying up of the donkey and turning him into the road, the accident could have been avoided by the use of reasonable care on the part of Mann.

Apply this case to workmen's claims. The question always is, Whose final negligence brought about the injury? Or, notwithstanding the workman's carelessness, could the master (or those for whom he must answer) have avoided the mischief by the use of reasonable care? Again, the workman's negligence must have been such as to contribute to the injury, or the employer's defence must fail.



Again, the term "negligence" applies with varying force in various circumstances. Thus, a child or young person is not supposed to have the same amount of discretion as a person of mature years; and so what would be negligence in an adult is not in a youth. For instance, a girl aged seventeen, employed in a soda-water factory, was hurt in the face by the bursting of a bottle—which was owing to a defect in the "plant"—and when she sued for damages the employer said that she had contributed to the accident by not wearing a mask provided by him. The girl did not know of the danger, she said. It was decided that it might be lawfully held by a jury that although it would have been negligence in a grown man or woman not to put on the mask, it might not be negligence in a girl of seventeen, as she might not appreciate the risk she ran. And so the girl got her compensation.

#### THE WORKMEN'S COMPENSATION ACT, 1897,

is a considerable extension of the liability of employers to workmen who are injured in their service. The first thing to be noticed is that the Act is not general. In other words, it does not extend to all employers or all workmen. It only applies to railways, factories, mines, quarries, engineering work, and to persons employed about certain buildings. The provision about buildings is certainly curious. If a man is employed in or about a building which exceeds 30 feet in height, and is either being constructed or repaired by means of scaffolding, or being demolished, or on which machinery driven by power is being used for the purpose of construction, repair, or demolition of the building, the Act applies. But if the building does not exceed 30 feet in height, the Act does not apply. It would seem, therefore, that if a man is employed in erecting, say a factory chimney, which is to go up eventually to a height of 200 feet, and when the chimney has been built up to 29 feet he drops off and is hurt, he is not entitled to compensation under this Act; but if the building happens to be 31 feet high at the time he tumbles off he can claim compensation. This, of course, is provided that scaffolding is being used in the building, or else that machine power is being used. It is interesting to notice that a man employed in repairing a building can get no compensation unless scaffolding or machine power is being used, but if he is employed in demolishing one, the presence or absence of scaffolding makes no difference. The rule as to the building being 30 feet high will, of course, exclude all claims for compensation when a builder's workman is hurt in pulling down a small house. Practically all factories, workshops, and public buildings would be included within the over 30 feet class, and so would most shops, and even the ordinary suburban villa of two stories and an attic.

I suppose the intention of Parliament was to include within the purview of this Act only dangerous trades and callings. For instance, factories are included (see p. 690), because a factory is a place where power-driven machinery is used, but workshops are not included. A factory is made to include any dock, wharf, quay, warehouses, machinery, or plant to which any provision of the Factory Acts

is applied by the Factory and Workshop Act, 1895, and also every laundry where power-driven machinery is used.

Engineering work means any work of construction, alteration, or repair of a railroad, harbour, dock, canal, or sewer—which is, I suppose, for the special benefit of navvies. It also includes any other work for which machinery driven by power, *e.g.* a steam engine, is used.

**Who is liable?**—The person made liable by the Statute is called “the undertaker.” This funereal-looking term is a word inserted in the Statute, expressly coined for the occasion, to avoid the use of the word “employer,” and so get rid of questions about sub-contracting. For instance, when a manufacturer lets out his work to people who themselves hire the workman and receive a lump sum for the job, it is difficult to know who is the workman's employer. Again, if Jones contracts to build a row of houses for a lump sum, and he engages Smith to do the bricklaying work for a lump sum, and Smith hires the working bricklayers, Smith is the employer of those bricklayers. But by this Act Jones is the undertaker, because he is the person who has undertaken the job of constructing the houses. Therefore, if the working bricklayers are injured, it is the intention of the Act that they should look to Jones for compensation.

In the case of a railway, the Railway Company is the undertaker ; in the case of a factory, quarry, or laundry, the occupier (*see* p. 707). In the case of a mine, it is the owner within the meaning of the two Acts regulating coal and metalliferous mines. In the case of engineering work, it is the person who undertakes the construction, alteration, or repair of the railroad, harbour, etc. ; and in the case of a building, the persons who undertake to construct, repair, or demolish the same are the undertakers. If the employer or undertaker is dead, his executor or administrator will be responsible.

**Who can claim compensation?**—Any person who is engaged in any employment to which this Act applies is a workman within the meaning of the Act. This is a much wider definition than “workman” under the Employers' Liability Act, for it includes persons who are not engaged in manual labour. For instance, a clerk of the works whose business it is to keep the men's time and to take account of materials delivered at the place, and so on, would be entitled to compensation under this Act, but he would not be entitled under the Employers' Liability Act, because he is not engaged in manual labour.

If the accident is fatal **the workman's dependents** may claim. The Act includes in England and Ireland such members of the workman's family as are mentioned in Lord Campbell's Act, to which I have referred on page 838. In Scotland it includes those persons who are entitled to compensation in respect of the death of the workman—namely, wife, children, parents, and grandchildren. But in the whole of the United Kingdom the dependents can only sue if they were, at the time of the workman's death, wholly or in part, dependent upon his earnings. Thus, for instance, the workman's aged father, to whom he was allowing 5s. a week, is a dependent. But if he was allowing him nothing, though he might have promised to do so should occasion require, the aged parent has no claim.



**Ship-Builders.**—A workman employed in a shipbuilding yard is entitled to compensation for injury even if the accident arose outside the yard itself, if he was at work upon a vessel in any dock, river, or tidal water near the yard. This clause was inserted to prevent the absurdity of a ship-carpenter not being able to claim, simply because the ship was being repaired in the dock and not hauled up on dry land, or in the dry dock, which formed part of the yard. At the same time, if the ship is a long way off the yard no claim can be put in. Thus, if men who work at Thornycroft's are sent to repair a vessel at the Nore, and one of them is hurt, he will not be entitled to any compensation from his employer. The Act also applies to workmen in the Government service—for instance, to those employed in the Government Dockyards. But it does not apply to people in the Army and Navy.

**How and when to claim Compensation.**—If you wish to claim under the Workmen's Compensation Act, you must, as in the case of the Employers' Liability Act, give **notice** to the employer as soon as practicable after the accident. I think the Act implies that the notice must be in writing. Moreover, the notice must be sent "before the workman has voluntarily left the employment." In other words, if I work for Jones as a collier, and am hurt while at work, I cannot give notice to leave his service, and actually leave, and then give him notice of the accident. I must give notice of the accident while I am still in his employment; unless he himself dismisses me before I have time to notify him. The notice just referred to is not a notice that you intend to claim anything; but only that on such and such a day and at such and such a place you were injured (say) in the right foot by (say) the bursting of a boiler. It must also give your name and address.

Within six months of the accident you must make your claim for compensation by giving a further notice to the employer. This notice ought to state the amount claimed, with particulars. For example: "Doctor's bill, £3; ten weeks' wages lost, at 45s. per week;" and so on. It ought also to give your name and address, and the date and cause of the accident, as in the last paragraph. The notice should be sent by registered post to the employer's place of business; or it can be sent by hand.

One curious provision of the Act—passed, no doubt to prevent the employers from being harassed by claims for slight injuries—is this: No workman can claim unless he has been **disabled for at least two weeks** from earning full wages at his trade. Thus, if I am a collier, paid by the ton, and a piece of coal drops on my arm when I am working, and hurts my arm and I am laid up altogether for (say) a week. The next week I begin to work again, and owing to the stiffness of my arm I cannot work so well as usual, and consequently cannot send up so much coal. The following week I am right again. I have a claim under the Act, because for two weeks I could not earn full wages. But if I recovered altogether in the first week, or within the fortnight, I have no claim at all.

A second case that workmen ought to know of is that no compensation is payable if it is proved that the injury is due to **the workman's own serious and wilful misconduct**. What is meant by this, I think, is, that

if the employer can show something like a positively wilful and reckless disregard by the workman of the ordinary precautions that ought to be taken, the workman gets nothing. To put an obvious instance:—If a miner opens his safety lamp to light his pipe when in the mine, and so causes an explosion, the man who by his recklessness caused the mischief has no claim; though the other injured ones have.

You should also take notice that **the Act leaves you your old remedies** under the Employers' Liability Act and for the master's personal negligence. (*See previous part of this chapter.*) But you cannot have both. That is, if you are injured by your employer's personal negligence, you can bring an action for it; or if you have been injured by the negligence of a superintendent, foreman, etc., you can proceed under the Employers' Liability Act. But then you cannot afterwards claim under the Workmen's Compensation Act. It is provided, however, that if you bring an action in the County (or Sheriff's) Court under the older law, and the judge decides against you but he is of opinion that you had a good claim under the Compensation Act, he can award you a sum under the Compensation Act, deducting, however, the costs and expenses to which you have put the employer by proceeding in the wrong fashion.

**How much can you claim?**—The case differs, of course, according as the injury does or does not have a fatal termination. When it results in **total or partial incapacity**, the workman has a right to a weekly pension, and not (as under the Employers' Liability Act) to a lump sum. The amount of the pension is not to exceed half the average weekly earnings of the man during the twelve months before the accident, if he had been in the same employ for twelve months. If he had been less than twelve months employed, you take half the average for that less period as the maximum. Thus, if he had only been in the service a month, and had earned 20s., 25s., 22s., and 30s., you strike the average—24s. 3d.—and allow him not more than 12s. 1½d. per week. I take it that the intention of the Act is that in cases of total incapacity the *maximum*, or thereabouts, shall be awarded; for the Statute goes on to say that in cases of partial incapacity the arbitrator shall take into account the difference between the earnings before the accident and the wages capable of being earned after the accident. The effect of this seems to be that if the workman is able to earn less than half, he is entitled to an amount to make it up to half. Thus, where a man's wages were 30s. per week, and after the accident he can still earn 15s., it is very dubious if he will receive anything. If he only earns 12s. he can claim at least 3s.

**Note**, no compensation is payable for the first two weeks. And the utmost maximum is £1 a week. So that a workman earning £3 a week, and totally incapacitated, cannot get more than the man who was earning £2. When the employer has paid by the week for six months or more, he (but not the man) can demand that a lump sum shall be fixed to be paid instead of any more weekly payments.

**To prevent malingering**, every man who gives notice of an accident must submit to an examination by the employer's doctor. If not, he loses his right



to compensation so long as he disobeys the Act. And in the case of incapacity, where a weekly sum has been awarded, the employer can send his doctor in as often as he likes to see that the man is not abusing the privileges given him by the Act—to be plain, to see that he is not shamming and stopping away from work out of laziness. If the workman has a medical certificate given against him, he may apply to be examined by the Government doctor for his district, whose name and address can be obtained from the factory inspector, or from the Home Office, London, S.W. The Government doctor's certificate is final and conclusive, whether for or against the workman.

In a case of **fatal injury**, the dependents (p. 857) of the workman can claim a lump sum, which is to be the workman's average earnings for the previous three years in the same employer's service. If he were employed less than three years, then not more than 156 times the amount of his average weekly earnings during his period of service. In no case is it to exceed £300, nor to be less than £150. This is for **persons wholly dependent** on the dead man's wages, such as a widow, or young children. For persons only partly dependent, the above sums are fixed as the utmost that can be awarded; but it may be less. You see the difference. Wholly dependent—three years' wages: not less than £150; not more than £300. Partly dependent—not more than three years' wages, or not more than £300; but not so much if the arbitrator likes to make it less. Thus, if the workman had an aged parent, seventy years old, to whom he allowed 5s. a week, that parent would not get three years' wages. At least, I should say not. Probably £50 would be an ample sum; being equivalent to 5s. a week for four years.

The arbitrator may order any sum awarded to a dependent to be invested for that dependent's benefit, or otherwise applied. That is to say, the money will not necessarily be handed over in a lump sum: hardly ever, in fact. If the arbitrator thinks fit, he may order the money to be invested, through the Post Office, in purchasing the dependent an annuity. Thus, the aged parent aforesaid (aged seventy) would receive an annuity of £10 on the payment of about £80 down—an extravagant rate. An ordinary insurance society would do it for much less, I imagine.

The **weekly payments to an incapacitated workman may be revised** on the application of master or man, if the one thinks he is paying too much or the other thinks he is receiving too little.

It may interest money-lenders and others to know that a weekly payment or a sum paid in redemption thereof cannot be charged, assigned, mortgaged, or anything of the sort. So that the workman cannot sell his pension, and nobody but an idiot would lend him money on it, for the security is void at law. Neither can the master deduct from the money any debt owing to him by the workman.

The intention of the Act, doubtless, is to compel employers in the included trades to insure, as scores of employers insured against liability under the Employers' Liability Act. The Statute provides that if an employer has insured, and then goes bankrupt or insolvent, a workman entitled to compensation has a preferential claim upon the insurance money. That is to say, the

workman may apply to the County Court Judge (the Sheriff in Scotland), who may direct the Insurance Office to pay the insurance money, not to the employer, but into the Post Office Savings Bank, to be applied for the benefit of the workman.

All claims to compensation are to be settled by arbitration, but not quite in the same way as ordinary arbitrations. In the first place, a new and peculiar method may be employed. The employer and workmen at any factory, etc., may choose a committee, representative of both sides, and all claims are then to be settled by the committee, unless, before the committee meet to consider the matter, one party gives written notice to the other that he objects. The committee need not decide the matter themselves, but may appoint an arbitrator to decide it. The committee need not be one for each works. There exists in at least some trades a joint committee of masters and men for the settlement of disputes. For instance, I believe that in Northampton there is a joint committee of masters and men, which appointed Lord James as a kind of umpire or president, which settles disputes in the Northampton boot and shoe trade. It would be quite competent and most proper for the employers and the employed at each boot and shoe factory in Northampton to hold a meeting and agree that the above-named joint committee should have power to make compensation awards.

If there is no committee, or if master or men object to its interference, or the committee do not settle the matter within three months from the date of claim, a single arbitrator must decide it. If the parties cannot agree on an arbitrator, the County Court Judge acts (in Scotland, the Sheriff). As some County Court Judges are already overloaded with work, the Lord Chancellor has power to allow of any such judges to appoint an arbitrator instead of acting himself. Should an arbitrator die, or refuse, or be unable to act, a judge of the High Court may appoint a new arbitrator. (This does not apply to Scotland.) An arbitrator may refer a difficult point of law to the County Court Judge (or Sheriff). An appeal lies from the decision on such point of law to the English Court of Appeal or the Scottish Court of Session.

**Contracting out** is not allowed under this Act in the same way as under the Employers' Liability Act. Still, there is some liberty of contracting out. This is how it can be done. The employer may submit to the Registrar of Friendly Societies (*see* p. 789) a scheme of compensation benefit, or insurance for his workmen. Then the Registrar must take steps to ascertain the views of both sides. On being satisfied that the scheme is not less beneficial to the workmen and their dependents than the Act, he may certify the scheme to be good. The employer may then contract with his workmen to accept the benefit of the scheme in place of the benefit of the Act. There is to be **no compulsion** on any man to come into the scheme. If the scheme contains a compulsory clause, the Registrar must not certify it.

The certificate given is to be for a limited period of not less than five years; but it is subject to review at any time. This is a matter for Trade Unions. If a complaint is made to the Registrar, by or on behalf of the workmen, that a scheme is no longer so beneficial as the Act, or that it is



being violated, or unfairly administered, the Registrar must inquire into the complaint. If he is satisfied that the complaint is well founded, or that other satisfactory reason exists, he may revoke the certificate.

But suppose you have been paying sixpence a week into one of the benefit funds for a year or two, and then the certificate becomes revoked, **what becomes of the money?** Well, that is a matter for master and men to settle between themselves. If they cannot agree, the Registrar must be called in again to settle it.

I ought to add that a scheme under the Act may be a general one applying to any number of masters and men. Thus, for instance, a scheme might be made to include all the colliery owners and their employees in Durham and Northumberland. Or the scheme may be simply in connection with one colliery, factory, etc.

## CHAPTER XL

### THE LAW OF THE CARRIER.

#### SECTION I

#### CARRIAGE OF GOODS.

Private carriers—Liable only for negligence—Unless they "warrant" the goods to go safe—Or limit liability—Who are private carriers—Furniture-removers—Private carrier must show that he was careful—Common carrier—Difference between private and common carrier—Common carrier liable, though not blameable—When not liable—Act of God—Queen's enemies—The vice or fault of the thing carried—The packing of brittle goods—"This side up: with care"—Negligence of sender—Special contract—Mere public notice is not a contract—Contract with Railway Company must be in writing—Must be just and reasonable—Never just and reasonable if Company not to be liable at all—Railways running boats in connection—Certain goods to be declared—Else carrier not liable—Those goods must be over £10 in value—Railway Company bound to carry everything except dangerous goods—Other common carriers only liable to carry what they usually carry—Railway Company are not common carriers of all goods—"Packed parcels"—Railway Company must not favour anybody—"Returned empties"—"Owner's risk"—Undue preference—Public bodies may complain—Carriage of animals—Gill's frisky cow—Punctual delivery—Refusal to receive goods—Refusal to pay carriage—The Company's rights thereon—Who pays carriage?

**T**HERE are two kinds of carriers of goods for hire—namely, private carriers and common carriers. This section will chiefly deal with common carriers; but I will first dispose of

**Private carriers.** A private carrier is a man who does not make it his trade to convey goods from place to place, but who now and then undertakes to carry goods for another person, receiving payment for his trouble. The distinction practically amounts to this: The common carrier, by his advertisements or his mode of carrying on business, says to the public: "I will carry goods of anyone who brings them to me to be carried from London to Cambridge [or wherever it may be] at definite rates." The private carrier says: "I have horses and carts, and I am willing to make contracts with individuals who pay me to carry goods for them. I have no definite place whence I start, or place at which I deliver. I do not ply between two known termini."

The best kind of example is a **furniture remover**, whose usual mode of carrying on business is this: Jones is about to afford himself the pleasure of removing from London to Bristol. He thereupon goes to Smith, a furniture remover, and asks for an estimate of his charges for removing his household



goods; and Smith, after taking a look at the quantity of stuff in the house, says: "I will pack this furniture and carry it in one of my vans to Bristol for £30." Jones agrees. Smith is not a common carrier, but a private one.

The consequence is that if Jones's furniture is damaged on the way to Bristol, the liability of Smith is not that of a common carrier (*see* p. 866), but the **liability of a private carrier**. And what is that? Well, the private carrier is liable if the damage is caused by the negligence of himself or his servants, but he is in no way responsible if the goods are stolen by thieves or carried off by force. He is not liable if they are accidentally burnt, unless his own or his servants' negligence caused the fire. He is in no way liable if some stranger causes the damage. To take a case:—The aforesaid furniture-removing van has arrived at Bristol, and is being driven up the street, when a small boy throws a cracker under the horses' hoofs. The affrighted steeds begin to kick and plunge, become unmanageable, and finally the van is overturned. Naturally the furniture suffers. The furniture-remover is under no responsibility whatever to make good the damage. In all the instances given in this paragraph a common carrier would have been obliged to pay. So you see the importance of the distinction between private and common carriers.

Of course, a private carrier can, by contract with the owner of the goods, **limit his liability, or extend it**. It is a common thing for a furniture-removing contract to contain a clause restricting the liability of the remover to £5 for any one article. On the other hand, I have known cases where the agreement has been that the carrier warrants the safe carriage of the goods at all events, act of God and the Queen's enemies always excepted.

Again, a private carrier is not in any way bound to carry your goods unless he pleases. Or he can say: "I will agree to transport the articles for you on such-and-such terms only." The common carrier has no such option (*see* p. 866).

The private carrier is **worse off than a common carrier in one respect**, and one only. As I shall show you (p. 872), there are a number of classes of goods, mostly goods of small bulk and great value, such as cash, bank-notes, gold and silver plate, and so on, which the common carrier is not liable for unless the consignor has declared the contents of the parcel and the value thereof. Now a private carrier has no right to any such declaration. If I, for example, send a package of silver plate value £100 by railway, I am bound to declare the value and contents of the package when I hand it in; but if I send my plate along with my other goods *per* furniture-remover, I need not make any declaration. If the Railway Company lose the parcel by negligence, I have no remedy if I made no declaration, but I should have a remedy against the furniture-remover.

When I say that you must prove negligence before you can recover compensation for lost or damaged goods against a private carrier, I do not mean that you need necessarily prove the exact particulars of the negligent act. For if I deliver goods to him to be carried, and they are not delivered, or are delivered battered about, the very circumstance of the loss or damage is

sufficient, on the face of it, to show negligence. Goods do not lose themselves, nor batter themselves about. But if the private carrier can show that the loss or damage occurred in spite of his reasonable precautions and the reasonably careful handling of his servants, he gets off. It practically comes to this: If I prove that I delivered sound goods to him, and that he delivered them damaged at the end of the journey, he must explain how it came about.

If you commit your goods to the care of a furniture-remover or other private carrier, and the goods are **lost or damaged on the way**, the carrier is liable to pay for them, unless he can show a good excuse—that is, show that, notwithstanding his reasonable precautions, the hurt occurred by the wrongful act of someone else or by accident. For example, one Hatchwell had a heap of bullion, and, instead of sending it by a common carrier from Malta to London, he committed it to the charge of Cooke, the purser of a King's ship. Cooke was to keep the bullion in his cabin, and hand it over in London, receiving a gratuity therefor. But when the ship arrived in the Thames the bullion had disappeared. It had been stolen out of Cooke's cabin by someone unknown. Cooke had to pay for it, because he could not show that he had taken all reasonable precautions to keep it safe.

Again, a private carrier may take on himself all the liabilities of a common carrier. For example, Blank wanted goods to be carted from a station to a wharf. He hired Asterisk to cart them. "Be very careful," said Blank. "Oh! I'll warrant they go safe," replied Asterisk. The goods were damaged in transit, but by no fault of Asterisk's. Nevertheless he had to pay, because he had taken on himself the risks of a common carrier by "warranting them safe," which is the very obligation imposed by law on the common carrier.

A **common carrier** is a person (or corporation) who undertakes to carry goods or money on a particular route for anyone who thinks fit to employ him. Moreover, he must "hold himself out," as the legal phrase goes, to transport goods as a public employment. It is very doubtful whether a man who undertakes the business of carrying goods from a place outside the realm to a place within the realm is a common carrier; but a person who undertakes the carriage of goods from a place within the realm to another place within the realm, or to a place outside the realm, is a common carrier. The point is that the starting-point must be within the realm. Again, you must notice that a carrier may be a common carrier of goods of one kind and not of another. For instance, if he holds himself out only as a carrier of parcels—not of goods of large bulk—he is only a common carrier as to parcels; and if he carries anything else in one particular case, he will be a carrier of the goods of large bulk, but not a common carrier. For instance, John Jones has a horse and van with which he makes daily journeys between Guildford and Croydon. He receives parcels at Guildford from whomsoever brings them, and delivers them at addresses in Croydon; and parcels at Croydon, and delivers them at Guildford. Now suppose someone comes to Jones at Guildford one day and brings a block of marble weighing a couple of tons, saying, "I want this delivered to Perkins, Bridgend, Croydon." It is obvious that Jones is not a common carrier as to this load, because plainly it is



beyond the usual compass of his horse and van. It is not the kind of thing that he holds himself out to carry. And though he may agree to receive the marble, and to carry it to Perkins at Croydon, he only undertakes the duties and liabilities of a private carrier.

I have been at the pains to make this distinction, because it is very important. **The difference between a private carrier and a common carrier** is identical with the difference between a common innkeeper and a lodging-house keeper. The common innkeeper is bound to take in as many guests as he has room for, provided they can pay for their accommodation. He is liable for the safety of their belongings brought on his premises, and must pay even if those goods are damaged by no fault of his. If I drive to an inn and put up there, and my horse is turned into the innkeeper's field, whence it is stolen by a robber, who kills the innkeeper's servant who is watching over the horse, the unfortunate boniface must pay me for my nag. The lodging-house keeper, on the other hand, can pick and choose his lodgers, and is not liable to them for loss of, or damage to, their property unless it happened by the negligence of himself or his servants (*see* p. 236).

So with carriers. **A common carrier cannot refuse to carry goods of the kind he holds himself out to carry. And he is liable for damage even when he is not to blame.** A private carrier, on the other hand, need not carry my goods unless he likes, and is only liable for damage happening through the negligence of himself or his servants. (Negligence is defined on p. 834.) He can, if he likes, contract to be liable like a common carrier, but he usually does not.

The only defences open to a common carrier when goods committed to his care are lost or damaged are: (1) act of God, or *vis major*; (2) act of the Queen's enemies; (3) the inherent vice of the thing itself; (4) the contributory negligence of the sender of the goods; (5) contracting out; (6) that the goods are of a kind that ought to be declared as to value, and that they have not been declared.

**What is Act of God?**—An American lawyer of great repute has defined it as "accident produced by any physical cause which is irresistible"; for example, loss by lightning, storm and tempest, by flood or by earthquake, by sudden death or sickness, is loss by the act of God. Suppose you send goods by rail, and the driver of the train is shot by a robber, so that he is unable to apply the brake or to regulate the speed of the engine, and in consequence there is a great smash, and your goods are destroyed, the Railway Company must pay you for them. But suppose the engine driver is suddenly smitten with paralysis, and the accident to the train and loss of your goods occur by reason of that, you have no remedy. For illness produced by physical causes (*i.e.* not by the wrongful act of the sick man or of another person) is always accounted "act of God." Again, if the train catches fire owing to its being struck by lightning, the Railway Company is exonerated. It is "act of God."

If goods are destroyed or damaged by an unusual convulsion of Nature, the carrier may still be liable if it can be proved that he was in fact guilty

of negligence without which the loss would not have happened. For instance, if I give a parcel of goods to a carrier to carry by road in his van from Maidstone to Deptford. The carrier finds that a bridge has been carried away by a flood, and instead of going round until he finds another bridge, he tries to ford the stream. Swollen by the flood, the torrent sweeps the carrier and all his parcels a long way down. At last they are rescued ; but my goods are quite spoiled. I can sue the carrier for compensation ; for though no doubt the accident would not have happened unless there had been a flood, yet this was not the immediate cause of my loss. The immediate cause was the carrier's foolishness in trying to force his horse through a torrential stream.

What is "act of the Queen's enemies"?—For the United Kingdom this defence has never, so far as I know, been set up by a land carrier ; but it may be and has been by a sea carrier. It means that the goods have been captured, damaged, or destroyed by an alien enemy—that is, a foreign foe with whom Great Britain is properly at war. It does not include piracy or rebellion. Suppose, by way of example, that the people of the West of England broke out in rebellion, they would not be the Queen's enemies, but the Queen's rebels ; and any common carrier prevented from carrying out his contract by those rebels could not plead it in defence. And here, again, if the carrier has conduced to the loss or damage by his own negligence, though the hand of the foreign foe dealt the blow, the carrier is still liable. Thus, if Britain were at war with some Power whose cruisers were notoriously swarming in the Channel, and a sea carrier, with my goods on board, chooses to run right down mid-Channel in broad daylight without waiting for a convoy, when by waiting a day or two he might have been convoyed by a British man-of-war, it is his own fault if he is captured, or if shot and shell strike him and damage the cargo. And as it is his fault, he must pay me for my lost or damaged goods.

Then, again, I have said that the common carrier is not responsible when the damage occurs by the "inherent vice" of the thing carried. What is inherent vice? Let me show you by an example. Farrar delivered to one Adams, a common carrier, a pipe of wine to be carried to a customer in his (Adams's) waggon. Adams drove the waggon gently and with reasonable care ; but the pipe burst and the wine was spilled. Adams was adjudged not liable, because the accident occurred by reason of the natural quality of the wine. Fermentation had set up and had generated gas, and this had burst the pipe. Again, a sea carrier takes on board a cargo of oranges. He is not liable for damage caused by some of them decaying on the voyage. A third case : Murphy consigns a horse *per* Clyde Shipping Company's boat, from Waterford to Greenock. On the voyage the high-spirited animal becomes alarmed by the rocking of the ship and the noise of the engines. It kicks and soon hurts itself severely. The Shipping Company are not responsible, because the accident is the horse's fault.

It should be remembered, however, that the carrier is bound to be extra careful of perishable goods ; or perhaps I ought to say that he is bound to take such measures for their preservation as a reasonable man would



take. For example, ripe fruits require airing or ventilation; and the carrier must see that this is done, or he will be liable if they rot. If a barrel containing liquid is stove in and he knows it, he must stop the leak as best he can. If goods liable to damage by wet should become wet in course of transit, he ought to dry them, even if he has to unpack them for the purpose. But no carrier is bound to delay his journey in order to stop leaks, lay goods out to dry, etc.

"**This side up—with care**" is the proper kind of notice to mark upon a box or package that you wish to be carried in a particular way. Or if you wish it to be handled gently, and not thrown about in the customary way of railway porters, mark it, "Fragile—with care," or "Glass—with care." Be sure you use a striking label for the caution, so that it will be certain to catch the eye of the railway man or carrier. Mr. Hastings delivered to Mr. Pepper, a common carrier, a box containing a glass bottle filled with oil of cloves. Mr. Hastings marked the box, "Glass—with care—this side up." Pepper, or Pepper's man, after the fashion of many carriers, took no notice of the label, and did not carry the box that side up. The consequence was that the bottle, instead of standing on its bottom, was lying on its side during the journey, and the natural result was that the jolting of the cart broke the bottle and the oil of cloves was wasted. Pepper had to pay. "The label on the box," said the judge, "was sufficient to warn you that the goods inside were liable to damage unless you kept the box 'this side up.' You chose to disregard the warning and that was negligence on your part." Perhaps I need hardly point out that Pepper's defence was "inherent vice"; in other words, that it was the nature of glass to break on the slightest jolting and that his cart was bound to jolt. This leads me quite naturally and easily to the

**Negligence of the sender himself**, which is also a sufficient defence for the common carrier. The usual case in which the carrier contrives to shift the blame on to the shoulders of the sender is **when the goods are defectively packed**. To take an obvious instance, if I deliver to a Railway Company a wooden box, nailed up, filled with glass and china, but not scientifically packed—that is, merely thrown in higgledy-piggledy and then nailed up—and the Company's servant, not knowing what is in the box, puts it in the train with no great gentleness and by this rough handling and the jolting of the train the whole lot of crockery and glass is smashed, I can get no compensation. Why not? Because it is clearly my own fault that the goods were damaged. I think no one would contend that a reasonable man, having regard to the usual way in which parcels are treated by railway men, would deliver crockery unpacked and without **warning the Company of the contents** of the box. And even if the goods are properly packed, I ought to tell the Company that the contents of the box are brittle, so that they can take more than ordinary care of them; or else the defence can be set up by them "that the damage occurred through the inherent vice of the thing itself—*i.e.* its brittleness."

Now let us take another case. I deliver brittle goods improperly packed.

and the carrier knows of the improper packing. This fact altogether alters the case, because if he chooses to accept the goods, knowing they are improperly packed, he takes the risk of the breakage. He can refuse to take the goods unless they are properly packed or secured. Or he can say, "I will not carry goods in this state, except at owner's risk." You see, if he accepts the goods without making a contract for carriage at owner's risk, he can pack them himself if he likes before starting on the journey. If he chooses deliberately to carry badly packed goods, he must take the consequences. And when I say "if he chooses," I mean that if he knows, he chooses. And even more than this: if he ought to know, he chooses. Thus, if I take a dog to a railway station, and ask for him to be forwarded to Brighton, and I have fastened the dog up by a chain tied to his collar, it is the duty of the railway official to see that this is a reasonably safe fastening. If he does not look, and receives the dog at Company's risk, the Company will be bound to pay if the animal slips his collar and runs away.

It is also negligence to send goods improperly or insufficiently or illegibly addressed; and the carrier is not liable for the consequences should delivery be delayed.

To sum up—Always give notice to the carrier when you are despatching brittle or perishable goods wrapped up or fastened in boxes in such a way that the carrier cannot see the contents. It is enough to put on a label, "Glass—with care," or some similar warning. If he accepts goods knowing they are brittle or perishable, he takes the risk of them unless he makes a special contract with you.

From this it appears that a **special contract is a good defence** to the carrier; I mean, a contract by which you and he agree that his Common-Law liability shall be minimised. For such a contract there must be some valuable consideration, which invariably takes the form of a lower rate of payment to the carrier. I wish you to understand that a common carrier cannot, simply by fixing up a notice or advertisement, limit his Common-Law liability, except as to the goods in the Carriers Act (*see* p. 872). Except as to those goods, there must be a special contract—that is, an agreement, consented to by the sender and the carrier, that the carrier shall not be liable to the full extent.

**What amounts to a special contract, then?**—Well, it has been decided that if the carrier delivers to the customer or his agent a printed notice or ticket containing the conditions upon which he is willing to receive the goods, and the customer delivers the goods to be carried without dissenting from the terms of the notice or ticket, that is enough. Still more is it enough if, when the goods are delivered, the carrier verbally says to the consignor, "We only carry these at owner's risk," and the consignor does not dissent. Or, if the carrier says, "We have two rates—one for carriage at owner's risk, and one for carriage at our own risk," and the customer takes the lower rate.

The point is that a mere public notice by the carrier is of no avail, even if the customer has read such notice.

The **difficulty generally arises** in this way: Brown delivers to a carrier goods to be carried. At the time the carrier gives Brown a ticket, printed, but



filled in, which on the face of it is a receipt for the goods, and on the back is a notice that the carrier only undertakes to be responsible for negligence of himself and his servants (*i.e.* not for the acts of other person, or pure accident, *see* p. 866). Brown never reads these conditions. Is this a contract? The whole question turns on this point—Did Brown know that the paper or ticket delivered to him contained conditions? If he did not, then there is no contract; because he cannot be taken to have assented to conditions of which he knew nothing. But if he did know—that is, if the fact that there were conditions was brought to his notice, he is bound, even though he never read those conditions. For instance, the paper delivered to Brown contained on the face of it in large letters, “**See back.**” If Brown does not take the trouble to look at the back of the paper, it is his look-out. He ought to have taken the trouble. But if there is no “**See back,**” and nothing to cause Brown to look at both sides of the paper, the unread and unknown conditions do not affect him in the least.

When the carrier is a **Railway Company**, the special contract must be signed by the consignor or his agent, or it is of no effect. When I say the consignor or his agent, I mean the person, whoever he is, who delivers the goods for carriage. It follows that the contract must be written or printed. I dare say most of you have delivered goods to a Railway Company for carriage, and, on inquiring the rates, have been told: “So much, owner’s risk so much, Company’s risk.” And if you have decided on the lower rate—*i.e.* owner’s risk rate—you have been asked to sign something. Probably you never read what you signed; but if you had, you would have found it to this effect: “The Company shall not be responsible for any loss or damage, except upon proof that such loss or damage arose from wilful misconduct on the part of the Company’s servants.” Some people enter into even stronger contracts than this, exempting the Company from every liability whatever.

Railway Companies are very powerful bodies, having a huge monopoly granted to them by Parliament; and in order to prevent them from treating the public unjustly and in a spirit of extortion, Parliament has imposed various restrictions on them. There are Parliamentary fares—*i.e.* the *maximum* that Parliament allows to be charged for carrying passengers. There are also Parliamentary rates—the *maximum* allowed to be charged for the carriage of goods. And again, section 7 of the Railway and Canal Traffic Act (1854) not only enacts that every special contract restricting the Company’s liability must be in writing, signed by the customer, but that **such contract must be “just and reasonable.”**

In finding out whether such a contract is just and reasonable, “the real question is,” as Mr. Justice Crompton said, “whether the individual and the public are sufficiently protected from being unjustly dealt with by the parties having the monopoly.” And you should notice that when you raise an action for damage to goods by a Railway Company, and they claim non-liability under a special contract, it is for them to prove that the contract is reasonable, not for you to prove that it is unreasonable.

Mr. Brown was a fish merchant. He used to buy fish at Grimsby in large

quantities, and send it *per* the Manchester, Sheffield and Lincoln Railway to various places. He had a permanent written and signed contract with the Company to carry his fish for five years at a rate one-fifth lower than the Parliamentary or ordinary rate, and the Company was not to be liable "for loss or delay in transit, or from whatever other cause arising." Brown delivered fish one day to be carried, and the Company's servants took it in, though they knew that, from pressure of traffic, they could not carry it in time for the intended market. The fish lost the market, and Brown lost money over it. Wherefore he "went for" the Company; and when they produced the special contract, he declared that it was unreasonable and unjust. But the Court decided otherwise, because, they said, this merchant could have compelled the Company to carry his fish without delay, and subject to a common carrier's liability, had he chosen to pay the Parliamentary rate. But he did not choose. In order to save carriage, he agreed to exonerate the Company from liability. There is nothing unreasonable or unjust about that.

The following contract was held unreasonable:—"The owner undertakes all risks of loading, unloading, and carriage, whether arising from the negligence or default of the Company or their servants, or from defect or imperfection in the station, platform, or other places of loading or unloading, or of the carriages in which the cattle may be loaded or conveyed, or from any other cause whatsoever."

But it is a perfectly reasonable contract for the consignor to agree that in consideration of a lower rate of carriage of his goods the Company shall only be liable for negligence of themselves or their servants.

Lord Wensleydale held, in one case, that every stipulation or condition professing to exempt a Railway Company from liability for its own negligence or misconduct, or that of its servants or agents, is unreasonable. As another judge put it, "It is impossible, without outraging common sense, to allow carriers to say, 'We will receive your goods, but we will not be bound to take any care of them, and will not be answerable at all for any loss occasioned by our own misconduct, however gross or injurious.'"

When goods are carried **partly by rail and partly by sea**, under a through-booking contract with the railway, the conditions are slightly different from the case of goods carried wholly by rail. The kind of contract I refer to is, for instance, a contract with the London and North-Western Railway to carry goods from London to Dublin, where the journey would be by rail to Holyhead, and thence by boat. The Company can guard itself from loss or damage during the sea transit, from act of God, the Queen's enemies, fire, accident from machinery, boilers, and steam, and all other dangers and accidents of the sea, rivers, and navigation. This is an ordinary condition imposed by other sea carriers. The Railway Company can take advantage of it by (a) publishing it in a conspicuous manner in the office where the through-booking is effected, and (b) delivering to the sender a receipt or freight note with the condition legibly printed on it.

If you book goods through in the manner above described, it does not matter whether the Company transmits them by sea in its own vessels or in



the vessels of another shipowner. For example, you can book by several of the Scottish lines from (say) Edinburgh to places on the Firth of Clyde; but the goods, on being detrained at Greenock or Gourock, will be placed on board ships not the property of the Railway Company. All the same, the Railway Company will be responsible for them, and any contract by which they try to exclude liability for the goods until they reach their final destination must be in writing, and signed by the sender, and be just and reasonable.

**Goods which must be declared.**—By the Carriers Act (1830), passed for the protection of common carriers, certain articles of great value in small compass are put on a different footing from ordinary goods. The sender who delivers any of these articles contained in a *parcel or package* must declare at the time of delivery to the carrier the nature and value of the contents of the package or parcel. The Act does not apply unless the value of the article or articles is more than £10. The following is an alphabetical list of things to be declared:—

Bank notes of a bank in the United Kingdom; bills of exchange; cheques; china; clocks; coins, gold or silver; deeds; engravings; furs; glass, including articles chiefly made of glass, such as a looking-glass with a frame round it; gold, whether raw or manufactured; gold plate; jewellery; lace, but only hand-made lace; maps; money, gold or silver; notes for the payment of money; orders for the payment of money; paintings; pictures [painting is used to denote a work of art. Thus, a coloured carpet pattern painted on paper is not a painting within the meaning of the Act, and need not be declared. Picture includes the frame: so that if the two together are worth over £10, they must be declared]; precious stones; promissory notes; securities for money—*e.g.* a guarantee; silk, including articles made of silk; silver and silver-plated goods; stamps; timepieces; title deeds; trinkets; watches; writings.

On delivery of the package or parcel, and the declaration of value and nature, **the carrier may charge extra** for carrying the package. He cannot charge anything he likes, but is bound to have in some conspicuous part of his public office a legible scale of charges. The sender can demand a receipt for the goods and the extra charge; and if this be refused, the carrier loses the benefit of the Act. What is the benefit of the Act, and **how does it affect the sender?**

In the first place, no common carrier is entitled to refuse to carry the goods just because the sender refuses to declare the nature and contents of the parcel. But should those goods be lost or damaged, no matter by whose fault, if they turn out to be of the declaratory kind, and above £10 in value, the carrier will not be liable. The intention of the Statute is that the carrier shall have notice, so that he can take greater care of these valuable parcels. When the declaration is properly made, and the extra charge paid or agreed to be paid, the carrier is liable just as for other goods. Moreover, even if no declaration is made when it ought to be made, the carrier is liable for loss or damage caused by the felonious act of his own servant—*e.g.* theft or wilful burning (arson). With the six exceptions just given, the common carrier is always liable for the safety of the goods committed to his care.

**The most important classes of common carriers** are Railway Companies,

Canal and Navigation Companies, owners (and masters) of ships employed as general trading ships trading regularly from port to port—for instance, the Carron Liners, which trade between Grangemouth and London; the Wilson Liners, trading regularly between Hull and Christiania [but not a tramp steamer (which has no regular ports between which it trades), and not a ship the whole of which is hired simply for one voyage]; owners of barges, lighters, hoy and canal boats, if they regularly carry goods between particular places for anyone who delivers goods to be carried; ferrymen, if they profess regularly to carry goods over the ferry; stage-coach proprietors; owners of carts, waggons, etc., regularly plying for hire between two certain towns or parts of a town; “Express” and other Parcel Companies, or persons who hold themselves out to carry anybody’s parcels—as Pickford, the Globe Express Parcels Company, and such firms.

The delivery of the goods to the carrier must now be considered. As I have already stated, it is the duty of every common carrier to receive and carry the goods of all persons indifferently—*i.e.* without preferring one before another—so long as they are ready to pay the hiring, and his conveyance is not already full. As I have said before (p. 865), a common carrier may only hold himself out as professing to carry certain classes of goods: for instance, I might set up as a common carrier of small parcels only; or, if I lived at Yarmouth I might set up as a common carrier of fish only. The goods must be delivered for carriage at a reasonable time before the conveyance sets out; otherwise the carrier can refuse them.

Now, **Railway and Canal Navigation Companies are under special liabilities** by the Railway and Canal Traffic Act. They are absolutely bound by the Act to receive, forward, and deliver every kind of goods and animals (except dangerous goods, and, I suppose, wild beasts) which they physically can carry. And they must afford reasonable facilities to the public for delivering their goods and animals to be carried.

But although they are bound to receive, carry, and deliver practically anything and everything that is not dangerous (*e.g.* dynamite), they are **not common carriers of anything and everything**. Like any other carrier, they are only common carriers of such goods as they profess to be common carriers of. For instance, take perishable articles, such as fish. The Company may say, “We do not profess to carry fish.” This means simply that the sender of fish can only make the Company liable like a private carrier; that is, for negligence. Or they can say, “We will only carry fish if the sender will sign a just and reasonable contract”; for example, a contract by which the Company is exonerated from liability except for the wilful neglect or misconduct of its servants. But they cannot actually refuse to carry fish at all. Nor can they impose unjust and unreasonable terms (*see* p. 870).

As to goods of which they are common carriers, however, Railway Companies are in the position of other carriers. They are bound to receive and carry such goods at the Company’s full risk, unless the owner voluntarily chooses to pay a lower rate and accept a greater risk himself.

At one time Railway Companies held out against receiving **packed parcels**.



You know that Sutton, Pickford, and other parcels-carrying firms collect parcels, send them by train, and deliver them quite as cheaply as the Railway Companies, and yet make a profit. The way of doing it is this: Sutton has, say, twenty small parcels to send from Birmingham to Manchester, for which he charges the senders 6d. apiece. He packs them all up in one great parcel and delivers it to the Railway Company to be carried at the rates applicable to large parcels. You know, I suppose, that if you send a parcel weighing twenty pounds it does not cost you so much as if you sent twenty one-pound parcels. Sutton makes his profit by sending a quantity. Now, when Pickford and Sutton started this system the Railway Companies were not pleased. They said, "If the people brought us the twenty small parcels we should charge twenty sixpences. As it is, Pickford and Sutton want us to carry the whole twenty parcels for half-a-crown; and they pocket the seven-and-sixpence merely for collection and delivery. This is not good enough." And so, when Sutton & Co. one day delivered a large package, the booking clerk demanded to know whether or not this was merely a number of small parcels packed up. "It is," said Sutton's man. "Then we do not carry it," replied the Great Western official. But Sutton was not the man to be treated in this fashion. "What business is it of yours," he said, "whether my package is this or that? You are bound by Act of Parliament to carry anything, so long as it is not dangerous; and to carry it at the statutory rates, and no more. I am ready to pay the statutory rate for a parcel of this size and weight. Carry it!" And when the Company persisted in refusing, he brought an action against them, and won it. So that the firms of parcel-carriers flourished amazingly, to the discouragement of monopoly and the benefit of the public.

You must, however, deliver your goods in decent time. It is quite lawful for the Company to fix a time—to say, for example, "No goods will be despatched unless received at the station at least fifteen minutes before the advertised starting-time." Again, the Company can refuse to accept traffic an unreasonably long time before the train starts; *e.g.* if I take a parcel to the South-Eastern station at 4 o'clock in the morning and say, "Please despatch this by the night Continental"—which leaves at 9 in the evening—they can refuse to take the parcel then.

**The Company cannot ask the contents** of a parcel or package delivered to them. It is no business of theirs. Their business is to carry it, unless they reasonably suspect it to contain aquafortis, oil of vitriol, gunpowder, lucifer matches, or other dangerous substance. In this case they can refuse to carry the parcel; or if the sender denies that the goods are dangerous, they can refuse to carry unless he himself opens the package and shows them the contents. They may also decline to receive breakable goods defectively packed (*see* p. 869) or imperfectly addressed.

But with these exceptions, if a Railway Company refuses to receive and carry your goods—nay, more, if a Railway Company does not **provide reasonable facilities** for receiving, forwarding, and delivering your goods, you can sue them for damages. These damages will be very heavy if the Company designedly

do this for the purpose of injuring you. As to what are "reasonable facilities," it is a question of fact in each particular case. It means the Company must give reasonable facilities at the station or receiving-office—not that they are bound to establish a station or office at any particular place, nor to arrange for the collection of parcels.

**"Returned empties."**—When a fruiterer at Covent Garden sends down hampers of grapes to Birmingham by the London and North-Western Railway, it is part of the custom of the line that the empty baskets can be sent back to London free. But this "free" carriage does not exempt the Company from liability as common carriers; and a contract that "the Company will not be responsible for any loss, etc., to wrappers or packages charged by the Company as empties" is not just or reasonable, and is therefore void. The carriage of empties is not really free; for it is conditional upon the wrappers, etc., having been first sent full by the same line.

**"At owner's risk"** is a frequent contract. "We have two rates—2s. owner's risk, and 3s. Company's risk," is the sort of thing said by the booking-clerk. If you send your goods at owner's risk, do not think that the Company can get off entirely. The phrase simply means that the Company are not to be liable as common carriers—*i.e.* for anything and everything—but only for negligence (*see* private carrier, p. 864). A similar meaning is put on the contract that "the Company shall **not be liable for leakages or breakages.**" Nevertheless, they remain liable for leakages or breakages caused by their servants' negligence or default.

The most stringent contract allowed is that the Company shall only be responsible for the "**wilful misconduct** or default" of the Company's servants (*see* p. 871). I really do not know what this means unless it means that the Company are not to be responsible unless their servants injure the goods with a sort of deliberate malice. Perhaps it only means negligence. In my opinion, if it means more than negligence it is unreasonable and void.

A Railway Company booking goods "through"—that is, to be carried **partly over their line and partly over another**—are liable for loss or damage on the other line, caused by the other Company's servants, or in any other way. But it is a reasonable and proper contract by a Railway Company that they will not be responsible after they have handed the goods over in the ordinary way to another Company. Thus, I send goods from London to Glasgow. They go from Euston to Carlisle by the London and North-Western, and thence to Glasgow by the Caledonian. In the absence of special contract, the London and North-Western are liable all the way. But if I make such an agreement as above described, and the goods are lost or damaged, it is for the London and North-Western to prove that they were handed over to the Caledonian in good condition, in which case I "go for" the Caledonian.

But if my goods are lost or smashed by the Caledonian people, I can make them pay if I like—contract or no contract. The only difference the contract makes is that I can only go for one Company instead of two.

While on the subject, let me say that Railway Companies are **bound to give through booking at through rates.** What I mean is that the public



have a right as against Railway Companies to require that when two of them or more have connected lines or termini or stations near to one another, goods shall be booked through from the starting-point to the destination, no matter how many Companies' lines have to be used. The through rate must be a reasonable one. The way to get a through rate is this: Any person interested in through traffic can give notice in writing to each forwarding Company, stating the amount of the proposed rate, and the route by which the traffic is proposed to be forwarded. The rate may be either *per* truck or *per* ton. Then the Railway Companies have the right to object (in writing) to such proposed through rate, stating the reason of their objections. The person endeavouring to establish the through rate has then the right to carry the case before the Railway Commissioners, a sort of semi-judicial body, consisting of one judge of the High Court and two lay assessors, and the Commissioners decide the matter. They must take into account (a) whether the establishment of a through rate is a due and reasonable facility in the interest of the public; (b) if so, whether the route is a reasonable route; and (c) the amount of the proposed rate. It may be that the Companies concerned agree as to giving a through rate, but only object to the amount; and in that case the Commissioners fix the amount, and fix the proportions to be divided amongst the several Companies. If no objection is made within ten days, or if the objection is only as to the division of the rate amongst the Companies, the rate comes into force at once—that is, at the end of the ten days.

The Commissioners can and do compel any Company to accept a lower mileage rate than the mileage rate which they are at the time legally charging for like traffic on any other line of communication between the same points. Thus, if I want a through rate for corn from Ipswich to Manchester [*via* March (Great Eastern Railway) and Peterborough (Great Northern Railway)], I can compel the Great Eastern Railway to accept less than they charge for corn between Ipswich and March, and the Great Northern Railway to accept less than their regular rate between Peterborough and Manchester. I do not refer to the Parliamentary maximum rates of the Company, but to the rates actually in use—for in many cases Companies do not charge as much as their private Acts entitle them to exact.

The advantage to the public is that there shall only be one booking and one payment, instead of two. And the through rate may be cut down below the Company's usual charges, because the traffic is not unloaded and loaded by the same Company. Thus, in the case given above, the Great Eastern Railway would load, and the Great Northern Railway would unload. I ought to say that it is quite open to traders of a particular town or district, or a Chamber of Commerce, or a Town Council, as well as a private individual to demand a through rate, and to appeal to the Railway Commissioners.

No through rate will be granted by the Commissioners for private convenience, but only for the **public interest**. The fact that the through traffic is not likely to be large makes no difference. A saving of cost to the public is a good *primâ facie* ground. It is by virtue of this that one Railway Company is allowed to compel another (practically) to lend them the use of a

piece of line. For example, the Swindon and Marlborough Company formed a route between some stations of the Great Western Railway and some on the London and South-Western Railway. The Swindon Company applied for through rates over their line between those stations over the Great Western Railway and London and South-Western Railway. The Swindon Railway was much shorter than the existing routes, but the rate proposed was equal. The Commissioners compelled the two great Companies to make a through rate letting in the small Company; because it must be to the public advantage to have a choice of routes and it might develop competition.

The through-rate principle applies also to Canal Companies; and to Railway and Canal Companies that run ships in connection with their undertakings, or have an agreement for ships to be run by someone else (p. 871).

**Undue preference** of the goods of one person over the goods of another is forbidden by the various railway Statutes. The Companies must charge equally to all persons; that is, the same rate for the like services in respect of goods of the same description carried the same distance in similar circumstances. Goods of the same description means that they are "similar in those qualities which affect the risk and expense of carriage." Thus, bags of cotton and bags of jute are of the same description for this purpose; red wheat and white. But bags of silk would not be of the same description as bags of cotton, because more delicate.

**"Similar circumstances"** is always the stumbling-block when one complains of undue preference by a Railway Company. For example, the Midland Railway might charge considerably less per truck to Bass and Company for carrying their beer from Burton to London than they would charge to another brewer at Burton who sent smaller quantities at irregular intervals; because it is cheaper for the Company, truck for truck, to carry for a firm which sends large quantities every day than to carry for a firm which sends small quantities once or twice a week. In other words, where, owing to any circumstances, it is cheaper for the Company to carry for Jones than for Smith, the Company may charge Jones less than they charge Smith, though the carriage is for the same distance over the line, and they perform similar services for each.

On the other hand, take the case of Sutton (p. 874). The Great Western Railway attempted, as we have seen, to charge Sutton a higher rate on his packed parcels than they would charge anyone else for sending a single parcel of similar size, weight, etc. It was held that this was an undue preference, and Sutton could get back the extra money he had paid.

No preference is allowed to be given to **foreign over home merchandise**; nor can a Company charge more for **goods carried a shorter distance** than for goods carried over a longer distance on the same line. You often hear that it is cheaper to send goods from (say) Amsterdam to London than from Colchester to London. If this is so, it is illegal. But in considering the question of undue preference you are to consider whether the circumstances of the traffic are similar. For example, one can well understand that it pays the railway to carry 1,000 head of cattle, coming off the same boat, from



Harwich to London for £20, when it would not pay them to carry 10 head from Colchester for 4s. In one case they have a train-load; in the other they have not.

When Railway Companies can carry a longer distance at less cost, because of some difference in circumstances, they may charge proportionately less than for a shorter distance. If a trader guarantees a fixed minimum amount of traffic at regular intervals, the Company may agree to grant him cheaper terms than other traders.

Now let us see a case of undue preference. A Railway Company, threatened with the construction of a rival line, wrote to the quarry owners of the neighbourhood, saying, "If you will agree to send all your stone and slate over our line for so many years we will carry it for so much less." Some of the quarry owners agreed to this; but one refused. Thereupon the Railway Company reduced their rates for the former, but continued to charge the dissentient the old price. This was held to be an undue preference, and was stopped by the Railway Commissioners. Competition with other Companies is not enough to justify a preference; because the law intends all persons to have the right to use any railway on equal terms with everybody else.

**Collection and delivery.**—Some Companies in days past have attempted, and even now, I believe, sometimes attempt, to make an inclusive charge for carriage, collection, and delivery. And if you went to them and asked what were the terms for carriage alone, you doing your own collection and delivery, they would tell you there was no difference. But in two English cases and one Scottish case this was decided to be illegal. Some reduction must be made when the sender chooses to employ another carter or carrier to collect and deliver for him, or where he does it himself. If not, the Railway Companies would soon snuff out all the Parcels Delivery and Parcels Express Companies. And the reduction must be a fair one; that is, the real part of the inclusive rate that is charged as the cost of collection and delivery.

**Undue preference as between towns** can be dealt with by the Railway Commissioners upon complaint by the town aggrieved. The proper persons to complain are the Town Council or other local governing body, an association of traders, Chamber of Commerce, or the like.

Undue preference may consist not only in a different rate of charges, but also in a different style of treatment. It is obvious that if a Railway Company is bound to grant **equal facilities** to all persons similarly situated for the "receiving, carriage, and delivery" of goods, they are acting illegally if they refuse facilities to one which they grant to another. Thus, if I am a merchant sending goods to a goods station, where my carts are allowed to enter the station and unload there, and my neighbour is not allowed to drive his cart inside, but must unload in the street and carry his goods thence into the station, I am getting an undue preference.

But a Company can lawfully refuse to let one man's vehicles ply for hire in its yard, and grant the favour to another, so long as the public is not inconvenienced. This is the legal justification of the "privileged" cab system. But if the public is put to inconvenience by the exclusion, the Company must

admit all alike. Thus, a Railway Company can grant to one cab proprietor the exclusive right of standing his cabs in the station-yard, so long as the privileged man keeps there plenty of cabs to serve the ordinary public demand.

The **carriage of animals** is imposed on all Railway Companies by Statute, though no Railway Company is bound to carry them as common carriers. The effect is that a Company can always demand a special contract before receiving an animal for carriage, provided the contract be just and reasonable (p. 870). They are always liable for injury or loss caused by their own or their servants' neglect or misconduct; but their **liability is limited** by Statute to £50 for a horse, £15 per head of neat cattle, and £2 per head of sheep and pigs. More they cannot be made to pay, unless the sender, when he delivers them for carriage, declares a higher value. On such declaration the Company can demand, and are entitled to, a higher rate for the carriage, as specified in a written or printed notice on the Company's premises. This percentage must be a reasonable one; and if the sender is asked for, and pays, an unreasonable increased rate, he can afterwards claim back the excess.

The Company is bound to provide **food and water and proper trucks or boxes** for the animals carried, and to cleanse cattle trucks, pens, horse-boxes, and so on, and disinfect them either on each day they have been used and after they have been used, or not later than noon on the following day. If cattle are injured by breach of these rules, it constitutes negligence on the part of the Company, who will be liable to compensate the owner. As to the supply of water, it must be given on request of the sender or person in charge of the animals, and he is liable to a fine if he allows the animals to go without water for four-and-twenty hours. The animals must be carried and delivered with all reasonable speed. If not, the Company will have to answer for any falling off in their condition.

I cannot show the duty of Railway Companies as to the care to be taken of animals better than by relating the incident of **the frisky cow and the foolish porter**, known to lawyers as *Gill v. the Manchester, Sheffield and Lincoln Railway Company*. Gill sent a cow from Doncaster to Sheffield, he and his man travelling to the cutlery capital by the same train. On arrival the truck containing the cow was shunted into the station-yard. Whether the cow did not approve of being shunted, or for what other cause, I know not, but she became restive. A foolish porter began to let her out, when Gill called out, "Don't let the cow out. If you do, she'll go slap at you." But the porter thought he knew better. "She'll be all right when she's out," said he, and proceeded to let her out. First she went at the porter, but he cleared out of the way. Then she rushed for a pig pen, but was driven off. At last she jumped the pen, ran on to the line, and was killed by a passing train. The Company had to pay. "No reasonable man," said the judges, "would have let loose an excited cow. She should have been allowed time to calm down. As your servant did what no reasonable man would have done, he was negligent" (see p. 834).

Now for a few words on the **delivery of goods** generally and first as to **punctuality**. A Railway Company, unless it expressly contracts to that effect,



does not guarantee punctuality, any more than any other carrier does. All that you can require is reasonable quickness of carriage and delivery, and no more.

It is the duty of the Railway Company **to notify the arrival** of goods to the consignee, who should come and take them within a reasonable time. If he does not come within a reasonable time, the Company can charge extra for what is called "demurrage." Moreover, for that reasonable time the Company hold the goods as carriers, and are liable as carriers; but after that time they hold the goods as warehousemen and are only liable for negligence or wilful default of their own servants. Reasonable facilities must be given to the consignee for unloading and carting away. When goods are sent at a rate which includes delivery by the Company, the consignee is still entitled to order the Company to allow his own men or his own carrier to take the goods at their station.

A question that frequently arises is, **What are the rights of a carrier when the consignee refuses to pay the carriage?** In the first place the carrier cannot send the goods back. He can either detain them until the consignee comes and offers to pay for them, or he can deliver them and sue for the carriage. The consignee, if asked to pay on delivery, has the right to ask for a reasonable time to look at the goods to see whether he will accept them at all. For example, suppose a Midland Railway van drives to my chambers to-morrow with a large parcel. I am not expecting such a parcel. The van man says, "Ten shillings to pay, sir." I say, "Not so fast. I want to see if this is my parcel. What is it?" And on looking, I find it is a gas-stove. I say, "I never ordered a gas-stove, and I shall neither take it in nor pay for it." Now, if I had no right of inspection before I paid, I might find myself with this thing, not mine, on my hands.

The case of the consignee refusing to pay differs from the case of the consignee **refusing to accept the goods**. Take the instance I have just given. What is the carrier to do? He has carried this stove and is entitled to be paid by someone. Not by me, because it is not my stove; and I am not bound to pay carriage for any rubbish that anyone chooses to send me.

The **person liable to pay** is the person who contracts with the carrier. Therefore, in the instance given, the Midland Railway Company would demand the carriage from the sender of the stove. If he does not pay, he can be sued. And in no case is a carrier bound to give up goods until he has been paid. **Paid how much?** The answer is, a reasonable sum. In the case of a Railway Company the amount is limited by the tariff notices exhibited in the stations. In the case of other common carriers, by the amount usually charged. If a special rate has been contracted for, that is a reasonable sum.

If the consignee refuses to accept the goods, the carrier is not necessarily bound to give notice to the sender. He is only bound to do what is reasonable. It may be reasonable for him to notify the sender—especially in the case of perishable goods—but the question of reasonableness in each case depends on the particular facts; and if a jury come to the conclusion that the carrier has acted unreasonably, he must pay for it.

## SECTION II.

## CARRIAGE OF PASSENGERS AND THEIR LUGGAGE.

Passengers carried on different terms from goods—No compensation unless injured by negligence—Railway Company bound to carry all—Without distinction—And to provide sufficient number of trains—And to encourage through traffic—And give reasonable carriage accommodation—Must carry all from starting station—Not from intermediate station—Punctuality of trains—What loss and expense passenger may recover—Failing to catch a connection—Notices on the ticket—"Smokers" compulsory; except on Metropolitan District Railway—Bye-laws—Not valid if unreasonable—The ticketless passenger—No penalties except for fraud—Refusing to give name and address—Arrest by servants of Company—Forcible ejection from carriage—Overcrowding—Company liable when you are travelling on one Company's line with another Company's ticket—Railway accident insurance—Luggage—Carrier liable as for goods—owner's risk—Bound to carry some personal luggage free—What is personal luggage?—Not a rocking-horse—Luggage is best in the van—Company liable though not properly addressed—Luggage given to a porter to label and put into the train—Must not be given to porter's charge too long before train time.

THE carriage of passengers stands on quite a different footing from the carriage of goods. First of all, there are no common carriers of passengers. Even railways, though all bound to provide facilities for passenger traffic, are not common carriers of passengers. When I say that railways and other carriers of passengers are not common carriers, I mean that they are not under the same stringent liability in respect of travellers carried by them as they are in respect of goods. They are liable for the safe carriage and custody of goods in every event except those stated on page 866. But as regards passengers they are **only liable for injury caused by negligence.**

The reason for the difference is historical. Long before the country was under an efficient police, there were carriers of goods. If you had only made these carriers liable for their negligence, they might very easily have colluded with thieves, and when your goods were missing at the end of the journey, have said, "They were plundered by robbers on the way." By the custom of the realm they were debarred from setting up this defence, or any other except act of God and the King's enemies; and this compelled them to take efficient means to protect their packages from plunder. Now with regard to passengers the case was far otherwise. To begin with, passengers did not travel by public conveyance much (if at all) before Queen Elizabeth's time; by which date the country was fairly well policed. In the next place, travellers generally went armed and were in all respects able to look after themselves. So that the rule became established to the effect stated in the last paragraph in thick black type.

But persons who hold themselves out as carriers of passengers, whether Railway Companies, stage-coach proprietors, or what not, are **bound to receive and carry all persons** who come at a proper time, in a fit state to be allowed to enter the coach, and ready to pay the fare. Since the general introduction of railways, the duty of other carriers of passengers has become



of very small account, and I do not propose to trouble my readers with more than the general statement of the law as given above.

I propose to consider the position of **passengers by railway**, and, in the first place, I will consider what accommodation a Railway Company is bound by law to provide for its passengers. Remember, please, that a governing principle is that they shall afford all reasonable facilities without undue preference in favour of any particular passenger, town, or district.

It is clear that "reasonable facilities" must include a **sufficient number of trains**. The town council, local board, or any inhabitants of a town or village where there is a railway station have the right to compel the Company to run a sufficient number of trains at reasonable times in the day for the accommodation of the people of the district. The Railway Commissioners will see to it, if complaint is made to them and the complainants can make out a clear case for interference. A clear case means a reasonable one. You must show, amongst other things, that it would pay the Company to run these trains; that such trains would not interfere materially with superior traffic. The case is more reasonable if it can be shown that very little interference with present arrangements would be made. For instance, the London and South-Western and the London, Brighton and South Coast Railway Companies had a joint line from Tooting to the City. At one time the Brighton Company also ran seven trains daily on the joint line to Victoria Station. These seven trains they knocked off because they did not pay. Some South London gentlemen took the matter up before the Commissioners. It was proved that the joint line intersected trains running from Sutton to Victoria. The Commissioners ordered the Companies to re-establish a train service between the joint line and Victoria. "You need not run trains on purpose," they said. "All you need do is to establish a station or platform where the lines intersect: stop some of your Sutton trains and pick up joint-line passengers for Victoria. We do not say you *must* do it this way; but we do say that when there is such an easy way of accomplishing the object, you must accomplish the object somehow."

Upon the same principle of public convenience, Railway Companies are bound to afford proper facilities for **through traffic**. They must not allow their own rivalry to interfere with public convenience. In one case, the Uckfield (Sussex) Local Board compelled the South-Eastern and London and Brighton Companies to run passenger trains through to one another's stations at Tunbridge Wells. Before this, if you arrived by the London and Brighton at Tunbridge Wells you had to walk or drive to the South-Eastern station if you wanted to travel to London or elsewhere by the South-Eastern line, or *vice versa*. Thanks to the Uckfield Local Board, you now have a through route, Tunbridge Wells being the junction. A phase of the through-route question is that of catching trains at junctions. Railway Companies which adopt the policy of running trains so that passengers who wish to go forward by the train of another line shall just miss the connection can be stopped.

The next thing to be considered is **station accommodation**. The Corporation of Hastings once pulled up the South-Eastern Railway for not

providing a convenient booking-office, waiting-room, covered platform, and refreshment-room. It was held that as to the booking-office and waiting-room the Court could order the Company to mend its ways, and the Court did so. But there was no jurisdiction to compel the Company to provide such luxuries as a covering to the platform or a decent refreshment-room, as these were not "facilities for the receiving, forwarding, or delivering of passengers."

It would be a surprising piece of news to some of those who travel by the South of England lines, that a Railway Company is bound by Statute to afford all passengers **reasonable carriage accommodation**. They are also bound to find room at every starting station for **all persons** who present themselves and offer to pay the fare. At intermediate stations they may issue tickets conditionally upon there being room in the class for which the ticket is taken. If I take a ticket at an intermediate station and the ticket is not issued conditionally [it generally is], I am entitled to expect to be carried by the next train. If there is no room for me, the Company has broken its contract, and must pay me any damages that I reasonably sustain. I say "reasonably" on this account: I may be going to see my Aunt Maria; and by reason of not going by that train, and not keeping my appointment, she may be angry, and not leave me the £100 legacy that she would otherwise have done. But I cannot come on the Company for this. On the other hand, if I, a barrister, am going to attend a case for a 100-guinea fee, and in consequence of not being able to get there in time I miss the brief, I daresay I can make the Company give me a refresher.

This leads me to consider the question of **punctuality of trains**—a very delicate matter. When you see on a time-table, "*Pedlington, depart, 5.20 a.m. Liverpool, arrive, 8.43 a.m.*," are you entitled to expect that the train shall be absolutely punctual? No, sir, you are not. You are entitled to expect that the Company will use all due diligence in running the train. You are entitled to expect that the train will stop at (or start from) Pedlington and that it will carry you to Liverpool. And you are further entitled to expect that the train will arrive in Liverpool station somewhere about 8.43.

Suppose, for example, it reaches Liverpool at 9.30, and you have made arrangements depending on a punctual arrival, you would be justified in suing the Company for any damage you had sustained in consequence of the unpunctuality. That is, unless the Company could offer a reasonable excuse. If they proved that the lines were rendered bad by an unusual fall of rain or snow, or that an accident (not due to their own negligence) had blocked or impeded traffic, they would get off. And so if they adduced any other rational excuse.

But in no case are you entitled to absolute punctuality. If you cut your own arrangements so fine that you sustain damage because your train is a few minutes late, it is your own fault for managing your affairs so ill. I frequently do it myself; but, as Johnson said to Goldsmith, the fact that a man would do a thing himself does not prove that such a course of action is either reasonable or moral.

If a Railway Company is so unreasonably unpunctual that I lose money by



it, I have a right to sue for breach of contract. Or I have the right to **perform the contract myself at their expense**, provided I do no more than is reasonably necessary, or than a reasonable man would do. For example, if I arrive at Manchester Central Station by a Midland train timed to get there at 10.30. I intended to prosecute my journey by a train leaving Manchester London Road Station at 12, thus leaving myself plenty of time to walk across the city with my handbag. But my train does not reach the Central until 11.40, so that to catch the train at London Road I have to take a cab. The Midland Company are liable to recoup me the cab fare that I had to pay because of their unreasonable want of punctuality. For the purposes of argument, I have assumed that the Company had no reasonable excuse.

The great cases on this point have arisen when people have taken tickets by trains advertised to arrive at a junction in time to catch trains going forward. What happens if **you fail to catch a connection** owing to either a mistake in the time-table or delay on the journey? The two following cases will tell you:—

Mr. Denton went down to King's Cross one day, and, being desirous of going to Hull, consulted the time-table. He found a train advertised to leave King's Cross at 5 p.m., to arrive at Peterborough at about 7.20, and thence to go on to Hull, arriving at about 12 p.m. The Great Northern line did not run to Hull, but only to Milford Junction, where Hull passengers change to the North-Eastern Company's train. The Great Northern Company's time-table contained the usual "NOTICE.—The Companies make every exertion that the trains shall be punctual, but their arrival or departure at the time stated will not be guaranteed, nor will the Companies hold themselves responsible for delay," etc. Mr. Denton, finding that it would suit him to leave London at 5, and reach Hull at 12, paid his fare, took his ticket, and took his seat in the corner of a third-class smoking compartment of the 5 train. And so, as Pepys says, to Milford Junction. There he vacated his seat, took out his luggage, and asked for the Hull train. "There is no train to Hull to-night!" the porter replied. Thinking this mere ignorance, Mr. Denton insisted that the porter was wrong; but he proved to be right. It was the time-table that erred. Now, it was Saturday. There was no train on Sunday, and so Mr. Denton had to lodge at a hotel until Monday morning. Not unnaturally, he sent in the hotel bill to the Great Northern, and, when that Company declined to pay, raised an action. The Court compelled them to pay. Lord Campbell remarked that the Railway Company were not entitled to treat their own time-table as waste paper. It might have been different if they had been prevented from running the train by some inevitable accident.

Mr. Le Blanche lived at Liverpool, and, wishing to taste the delights of a fashionable watering-place, he took a ticket by the London and North-Western to Scarborough. The train was timed to run *per* London and North-Western line to Leeds, where the passengers changed into a North-Eastern Railway train, timed to start a little while after the Liverpool train's arrival. But the London and North-Western was late, and so the North-Eastern train started before the Liverpool passengers arrived at Leeds. There was no other train

that day, so Mr. Le Blanche chartered a "special" at the cost of some pounds from the North-Eastern Railway Company. This he tried to get out of the London and North-Western, but they would not pay; and the Court upheld them. While admitting that the unpunctuality was culpable, the judges asked: "Was it reasonable of the plaintiff to take a special train?" It might, they said, have been reasonable in some circumstances—as if he had been a physician called to Scarborough to attend an important case, when time was a matter of life or death; or a barrister who had to reach Scarborough for a case; or a merchant going down for big and hurried business. But Le Blanche was only going down for pleasure. It was absurd that he should spend £50 or more to avoid spending a night in Leeds, and merely in order to begin his pleasure a day sooner.

As Denton's case will have shown you, a Railway Company cannot, by notice in its time-table, get rid of the obligation to start its trains and catch its connections with diligence. Nor can they accomplish that end by a **notice on the ticket**. You all know it: "The Company will not be responsible for the consequences of any delay in the starting or arrival of trains from accident or other cause." If you read "other cause" literally, the notice is illegal nonsense. But you must read it to mean other cause of the same kind as accident—*e.g.* if the train is delayed by the fault of another Company, or by a man putting a sleeper across the line, this is in the nature of an accident; and the notice, as covering such things, is both sensible and lawful.

If a Railway Company take you by **the wrong train**—*e.g.* you ask a porter, "Is this the train for Hampton Court?" and he says, "'Ampton Court? Yessir!" and you get in and are carried (say) to Staines, and it is midnight, you can either get home somehow—*e.g.* by cart, waggonette, etc., and send the Company the bill, or you can lodge at Staines the night at the Company's expense, or you can walk home and make them pay you for the inconvenience. But if you happen to be a fragile sort of man, and the walk to Hampton Court knocks you up, and you have to pay a doctor's bill, you cannot get the doctor's bill out of the Company.

Smokers will be glad to hear that by Act of Parliament every Railway Company is bound to provide on every train a reasonably sufficient number of **smoking-carriages**. The only exception is the Metropolitan Railway Company. I suppose Parliament considered that there was plenty of smoke in all the carriages on this Underground line.

There used to be a good deal of controversy about the rules of Railway Companies **as to fares**. Railway Companies have the power, with the sanction of the Board of Trade, to make bye-laws to regulate the traffic on their lines, which include regulations as to the taking of tickets, excess fares, people who travel without tickets, and so on. They used to have a kind of notion that they could make any kind of rules they pleased so long as they could get the Board of Trade to agree to them. I believe that you best retain the knowledge you have paid to learn; and on this footing the Railway Companies ought to know by this time that although their bye-laws have been sanctioned by the Board of Trade, they do not necessarily bind the public. They have to



be reasonable bye-laws, and not repugnant to the law of the United Kingdom. And the judges, both in Scotland and England, have found more than once that a Railway Company's bye-laws are unreasonable, and in violation of the general law.

Take the case of the **passenger travelling without a ticket**. He is, I know, the pet aversion of the railway servant and the managing superintendent of the line. "Wherefore," said the Companies, "he shall be hounded down. He shall be fined. He shall be hauled violently out of the carriage. He shall be detained by the ticket collector. He shall be handed over to the police as a common malefactor." And they did not confine themselves to threatening. With the assistance of some intelligent official of the Board of Trade, the combined ingenuity of the Companies concocted the following bye-law:—

No passenger will be allowed to enter any carriage used on the railway, or to travel therein upon the railway, unless furnished by the Company with a ticket specifying the class of carriage, etc. Every passenger shall show and deliver up his ticket (whether a contract, or season ticket, or otherwise) to any duly authorised servant of the Company whenever required to do so for any purpose. Any passenger travelling without a ticket, or failing or refusing to deliver up his ticket as aforesaid, shall be required to pay the fare from the station whence the train originally started to the end of his journey.

This bye-law is bad, because it is unreasonable. If I, without intent to defraud, get into a train at Willesden Junction without a ticket and travel to Euston, I might, according to this bye-law, be required to pay the fare from Edinburgh, whence the train started. This is not only unreasonable, but repugnant to the law of the land; for it imposes a penalty for an innocent act. Even if I intended to cheat, it is unreasonable to penalise me, not according to the quality of my offence, but according to an accidental circumstance varying by reason of something that has nothing to do with me or my fraud.

Precisely the same arguments apply to the **passenger travelling beyond his ticket**. If I take a ticket from Brighton to Croydon, and travel through to London Bridge, the Railway Company have no right to penalise me for this unless I try to cheat them. Even then the penalty must not vary according to where the train started from, or anything of that kind. If I do not try to cheat, they can only charge me the fare from Croydon to London Bridge. Not necessarily the difference between the Croydon ticket and a London Bridge ticket. For instance, the fare to Croydon may be 4s. 6d. by that train, and to London Bridge 5s. The fare from Croydon to the Bridge is 10d. I must pay 10d.—not 6d. And if I travel without a ticket from Willesden to Euston without intent to defraud, I must only pay the fare between these stations.

Suppose I **try to defraud the Company**, I have committed a criminal offence, and can be given in custody, and fined by the magistrate. What is intent to defraud? In other words, **when can a passenger be arrested?** It will scarcely be believed, perhaps, but Railway Companies before now have

attempted to set it up as law that merely to travel without a ticket is an attempt to defraud. This is egregious nonsense, and the judges soon knocked it on the head. If you offer to pay the fare, or to give your name and address, you cannot be convicted of attempting to defraud the Company; unless, of course, you have got under the seat, or otherwise tried to conceal yourself.

Fraudulent intent is a state of mind. But as the state of a man's mind is never certainly ascertainable unless the man tells you himself, and is perfectly truthful about it, fraudulent intent as a legal offence must be inferred by the magistrate from the acts of the accused. And if the acts are consistent with innocence of intent, the magistrate has no right whatever to convict of fraudulent design. A young man once travelled on the Caledonian line with a ticket from Aberdeen to Edinburgh. At Perth he missed the Edinburgh train, and had to wait until next day. He then went on and got as far as Larbert. At Larbert the ticket collector said, "This ticket is not available to-day. It is a yesterday's ticket. I want 8d." The passenger declined to pay. "I have paid once," said he, "and, besides, the ticket collector at Perth said nothing about it. Why should you?" "Give me your name and address, then." "Certainly not," said the young man. "Then I shall give you in charge"; and accordingly the young man was delivered over to the Larbert policeman, locked up for two days, taken before the magistrates, and by them fined for travelling without a ticket with intent to defraud. The outraged passenger appealed to the Court of Session, and his conviction was reversed. "Your bye-law," said Lord Young, "may be all very fine as applying to rogues. But this young man was not a rogue. At the worst he only made an unfounded claim of right. I am surprised and grieved at the high-handed proceedings of this railway official."

So, you see, **merely refusing to give your name and address** is not enough to make you a defrauder, or attempted defrauder of the Company. The English Courts came to a similar conclusion in the case of a young man who foolishly refused to give his name and address. He was a season ticket holder; and declined to produce his ticket at Clapham Junction at the gate, and then would not give either name or address. He was also arrested and fined; but the High Court upset the decision.

**Season ticket holders** must produce their tickets whenever asked to do so, or else pay for the journey extra, if it is part of the contract signed by them when they took the season ticket, or is on the ticket. But if there is no such contract, a season ticket holder is liable to be summoned for non-payment of fare. He proves that he has already paid—that is, by paying for his season ticket—and he gets off. He certainly can never be fined; for how can you intend to cheat the Company if you have paid in advance?

Railway officials are apt to make a fetish of the ticket. I was once travelling by rail, and I **lost my ticket**. When I told the collector so, he said, "Then you must pay again, sir." I laughed. My risible faculties were tickled, because it struck me as such a cool proposal to ask me to pay for my journey twice. The ticket-collector, a country yokel, became alarmed and



'backed out, thinking, no doubt, that I was mad. He did not attempt to handle me as the Manchester, Sheffield and Lincoln porter handled Mr. Butler.

Mr. Butler was travelling on the Manchester, Sheffield and Lincoln Railway one day, and had the misfortune to lose his ticket. In consequence, when the collector asked him to produce his ticket, he was unable to comply. "Come out of this, then," the porter politely observed. "Not at all," replied Mr. Butler. "Then I shall fetch you out"; and suiting the action to the word, according to Shakespeare's precept, the porter laid violent hands on the respectable person of Mr. Butler and dragged him forth. It cost the Company several hundred pounds. For a Railway Company have **no right forcibly to eject a passenger** because he has no ticket, any more than I have the right to hit you on the head if you owe me sixpence. In Butler's case, as a matter of fact, Mr. Butler had paid his fare; but that made no difference. Had he been drunk or disorderly, I daresay he could have been lawfully turned out.

From these instances you will observe that the actual possession of the ticket makes very little difference to a passenger's position. The point is, (1) Has he paid? If so, and he can prove it, he cannot be made to pay again. (2) If he has not paid, did he intend to pay? If so, he cannot be treated as a criminal.

**Travelling by a different class** from that for which you have paid is another matter of interest. The Companies have bye-laws to the same effect as their bye-laws about tickets; that is, if you travel in a superior class you must pay the fare from the place where the train started. Such a bye-law is not worth the paper it is printed on. You can always be made to pay the actual difference—i.e. pay for what you had; and you can be fined if you try to evade payment. Now, suppose you take a third-class ticket from Bristol to London, and on presenting yourself on the platform ten minutes before the train starts, you find all the thirds full. You are entitled to go into a second; and if they are full, into a first. I will tell you why. You, having taken your ticket, are entitled to be carried by that train in a third-class carriage. If the Company don't carry you they have broken their contract, and you are entitled to perform it for them in a reasonable way. You are therefore entitled, so as to get to London in time, to take whatever carriage accommodation you can get. Strictly speaking, they have the right to sue for the difference in fare; and you have the right to counterclaim for damages against them for not performing their contract. But these damages are exactly the difference between the fare (third) you agreed to pay and the fare you were obliged to pay. Hence you each recover an equal amount against one another.

Suppose you took a second-class ticket, and there was no room, wherefore you seated yourself in a third-class compartment: the Railway Company must pay you the difference.

**Overcrowding carriages** is not, it appears, negligence on the part of a Railway Company. At all events, the mere fact that a carriage is overcrowded

is no cause of action against the railway. It may be that if the railway servants actually put a lot of passengers into a full carriage it would be a good cause of action against the Company for breach of contract. Most (if not all) the railway bye-laws impose a penalty on people who enter a full carriage if anyone inside objects. Such a bye-law is a valid one.

As I have stated, the liability for injury to passengers only arises from negligence. The slightest negligence is enough. But if an accident occur through something over which the Railway Company had no control, they are not liable.

The liability does not depend on the contract between the passenger and the Company. It depends on the duty that is owing to all persons lawfully in the train to take care of them. So that if I have not paid my fare—unless I am travelling with intent to defraud—and am hurt, I can still get compensation. And it does not matter whether I am hurt by the wrongful act or negligence of the Company with whom I contracted or not. Thus, Mr. Foulkes took a ticket by the London and South-Western Company to Richmond. The Richmond station belonged to the London and South-Western, but the Metropolitan District Railway Company had running powers over that bit of line, and passengers were allowed to travel by trains of either Company with tickets of either Company. The District Company, by whose carriage Mr. Foulkes travelled, had carriages with high steps, while the platform at Richmond was low. In stepping out, Foulkes was hurt, and he sued the Metropolitan District Company for damages. They replied: "You were not travelling by our train. Your ticket was a London and South-Western ticket." But it was held to be no matter. The Metropolitan District Company were liable for negligence by not providing a carriage of height suitable to the platform, contract or no contract. If Foulkes liked, he could have sued the other Company too for breach of their contract to carry him safely.

People who go to see their friends off are in the same position. If they are hurt owing to some defect in the approach to the station or in the platform, or by the negligent conduct of a porter in wheeling a luggage barrow (and so on), they can make the company pay for the sticking-plaster.

If a Railway Company give a free pass, or issue a cheap ticket—*e.g.* an excursion ticket—it is quite lawful for them to make conditions limiting their liability for injuries. If there are no such conditions, the liability is the same as in an ordinary case. For example, Mr. Burke went by a South-Eastern excursion to Paris. He took the usual book of coupons, which had printed on: "Cheap return ticket. London—Paris. 2nd class." Inside, opposite the first ticket, was a condition: "The Company will not be responsible, except for injuries happening on their own line." Burke was hurt in France, in the French Company's train, and it was held that he could not recover from the South-Eastern Company.

Again, where a cattle drover had a free pass, upon condition that he travelled at his own risk, it was held that the drover could not recover damages when he was hurt by the negligence of a porter. "*At owner's*



*risk*" for goods means "At owner's risk, except for negligence." But "*As passenger's risk*" for passengers means "Company not liable even for their own negligence."

I need hardly say that a Railway Company cannot make such a stipulation on its **ordinary tickets** by ordinary trains at ordinary fares.

One other item of interest. If you are insured against accidents, whether by *Cassell's Saturday Journal* or by a regular policy, and are paid by the insurance people compensation for an accident, this does not diminish your right against the Company by a single farthing.

Now for

#### THE CARRIAGE OF PASSENGERS' LUGGAGE—

a most important matter. You may be surprised to hear that a passenger's luggage is on more favourable terms than its owner. In other words, a carrier is bound to take **greater care of luggage** than of passengers; for a regular carrier of passengers is a common carrier of the passengers' luggage, though not of the passengers themselves. In fact, the law as to carriage of passengers' luggage is the same as that relating to the carriage of goods (sect. 1 of this Chapter). Therefore, should you be travelling by the South-Eastern Railway to Hastings, and at Croydon an accident occurs to the train by the fault of a London and Brighton Railway Company's servant, though the South-Eastern Railway might not be liable to you for personal injuries, they would, at all events, be liable for injury to, or loss of, your luggage.

It follows that if the luggage consists of **things that ought to be declared**, the Company will be protected if the things have not been declared (p. 872). Again, the Company may limit their liability for luggage by a **just and reasonable contract** (p. 870), which must be in writing, signed by the passenger, or else it is of no effect. As far as I know, and in my opinion, a contract of this kind cannot be reasonable when the traveller is paying the ordinary fare and carrying only the statutory amount of luggage (*see* p. 891). I can imagine that a contract, if properly signed, might bind the passenger if he was travelling at a reduced rate, or being allowed to carry more luggage than the law allows him the right to do. In practice this kind of contract never comes into play, because no one is ever asked to sign such a contract. In one case, however, a mere **condition on the ticket** is good enough to exonerate the Company, and that is when the journey is partly on one line and partly on another Company's. For example, if I travel from Holborn Viaduct to Paris, the London, Chatham and Dover Company may, by a condition on the through ticket, limit their liability on my luggage to the time it is on their own line or their own boats, and so escape responsibility for the acts of the French Company.

By the common law of the land, carriers of passengers were always bound to carry a reasonable amount of **personal luggage free of charge**. This was not a favour, but a right, and remains so to this day. And if you go into a part of the country where stage-coaches are still in use, as in the English Lake District, the coach proprietor is bound to carry a reasonable amount of **personal luggage** for you in the coach.

Railway Companies are all bound by their private Acts to carry a certain quantity of luggage without charge—generally 56 lb. for a third- and 112 lb. for a first-class passenger. Mind, only personal luggage. My readers will ask the old question, **What is personal luggage?** The keynote is “personal.” In some Acts the word used is “ordinary,” but the meaning is the same. According to the best definitions, “his clothing and everything required for his personal convenience; and perhaps even a small present, or a book for use on the journey” is “personal.” But they are not bound to carry as luggage articles of trade, such as a commercial traveller’s samples. Even the documents and bank notes to be used by a solicitor at the trial of an action were held not to be personal luggage; nor the sketches of an artist. In one case a man emigrating had a lot of sheets in his baggage, which was lost. It was held that this was bedding, not personal luggage. In another case it was held that a Nottingham gentleman, who had bought a large rocking-horse as a present for his children, was not entitled to have it carried in the guard’s van free as personal luggage. “The gun-case or fishing apparatus of a sportsman, the easel of the artist on a sketching tour, the books of a student, and other articles of an analogous character, the use of which is personal to the traveller, and the use of which has arisen from the fact of his journeying,” is how Chief Justice Cockburn described personal luggage.

It is always best to **put your luggage in the van**. Why? Because if your luggage is in the van it is in charge of the Company’s servants, and the Company is responsible for it. If you take it in the carriage with you, and it is stolen, the Company will probably escape liability; because you, having assumed charge of it yourself, ought to watch it yourself. The old gentleman who persistently inquired at every station, “Guard, is my trunk all right?” until he drove the guard to wish that he had been “a helephant instead of a hass, so that he might have carried his trunk with him,” need not have been so anxious. The Company was responsible for the safety of the precious baggage.

When a Company has been in the habit of supplying **porters to carry luggage to cabs**, it becomes a duty to continue the supply. And passengers may claim the services of a porter for this purpose as of right. If you hand your luggage to a porter to take to a cab, and he loses some of it, the Company is liable. They are also liable if he puts it down on the platform and somebody runs away with a bag. In fact, until he puts your luggage into the cab the Company remain responsible as common carriers.

A bye-law that “the Company will not be responsible unless the luggage is **fully and properly addressed** with the name and destination of the owner,” is void for unreasonableness. The Company can refuse to receive luggage which is not properly addressed; but having once received it they must answer for its safety.

And they must answer for its safety from the moment it is placed **in charge of one of their servants** when the passenger arrives at the starting station. For example, Mrs. Lovell arrived half an hour too early for her train, so she gave her bag to a porter and said, “Label this for —, and put it in



the train." The porter took the bag, and lost it. The Company had to pay. They set up that it was unreasonable to expect their porter to look after the bag for half an hour; and so it was, I daresay. But the answer is that the porter need not have done so. He might have said, "This is too early"; or he might have taken the bag, labelled it, and put it in the guard's van, where someone would have been in charge. The luggage was not given to the porter to look after in the same way that luggage is left in the cloak-room, but for purposes of present transit. The whole point in these cases is, was the luggage given in charge of the porter a reasonable time before the departure of the train? Thus, when Mr. Welch asked a porter to look after his luggage while he amused himself in a billiard-room for an hour, and the luggage was stolen, the Company was excused.

This leads me naturally enough to the next section; namely

### SECTION III.

#### CLOAK-ROOMS.

**Not part of a carrier's business to provide cloak-rooms—Railway porter not entitled to take care of luggage—Luggage in cloak-room must be looked after with ordinary care—The cloak-room ticket—Its conditions—You ought to read them—They constitute a contract if you knew they were there—Not responsible for goods over £10—Cloak-rooms not under Railway Acts—Lost tickets—When goods can be demanded.**

No Railway Company is bound to provide cloak-rooms as part of their duty as carriers. It is, so to speak, a separate business.

Many people are in the habit of handing luggage to a porter to look after. This is a mistake. They should **take it to the cloak-room**. Mrs. Hodgkinson once arrived at her destination, having two boxes as luggage. "Cab, ma'am?" asked a porter. "No, thank you," she replied; "I'll walk home and send for my luggage." "I'll put it on one side for you," said the porter, gratefully touching his cap, and pocketing the usual tip. Mrs. Hodgkinson accordingly walked home, and then sent for her luggage. But the porter, though he had put it on one side, had forgotten to keep an eye on it, and it had vanished. Mrs. Hodgkinson tried to extract the value from the Company, but without success. The lesson to be learnt from this case is that if a railway porter undertakes to look after luggage, he is doing what he has no authority to do, and you are asking from him something you have no right to ask. The left-luggage office is the proper place.

Now, what is the **liability of the Company** for luggage left at a cloak-room? To begin with, they do not take charge of it there for the purposes of transport. That is clear. So that obviously they are under no liability as common carriers. For the responsibility of a common carrier begins when the goods are delivered for the purpose of being forwarded, and ends when the transport ends. So that when the railway porter carries your trunk or portmanteau to the left-luggage office, as he is bound to do if you ask him, as soon as he puts it inside and you get your cloak-room ticket, a fresh kind

of liability begins. That liability is simply the liability of a warehouseman—namely, to take **ordinary care** of the thing committed to their charge. Understand, please, as carriers, the Company must take extraordinary care of a passenger. They must answer in every event—except act of God, etc. (p. 866)—for his luggage being carried safe and sound. But they need only take ordinary care of articles left in cloak-rooms. There is nothing in the Railway Acts that in any way extends this liability.

Indeed, the Railway Acts do not touch cloak-room contracts. You are left to Common Law. In consequence, the liability depends entirely upon the contract entered into. The Company is not bound to receive at its cloak-room any article whatever, except on its own terms. Of course, if you leave your bag and pay twopence, and there is nothing said about terms, and no conditions are imposed, the liability is as I have stated above.

But, as a rule, you have a **receipt or ticket** handed to you, with much printing on the back; and this printing consists entirely of conditions limiting the liability of the Company and modifying the relations between you. The conditions may be ever so unreasonable, ever so unjust, but you are bound by them if, knowing they were on the ticket, you did not dissent at the time. When I say “knowing they were on the ticket,” I do not mean that you need have read them. I believe I am the only man living who ever reads the back of his cloak-room tickets. The point is that you knew that there were conditions on the back, or had your attention drawn to the fact by “*See Back*,” on the front of the ticket.

Mr. Parker, for instance, paid his twopence, handed in his bag, and got a ticket with “*See Back*” on it. He did not look at the back, or he would have seen that the Company (South-Eastern Railway) was not to be responsible for any package beyond the value of £10. Mr. Parker's bag was worth more than £10. Some thief probably knew its value; for he entered the cloak-room while the caretaker was carelessly absent having a drink, and ran away with the said bag. When Parker tried a little claim for compensation, the Company said they were excused by the conditions on the back of the ticket. “Never read 'em,” said Parker. Upon which the judges remarked that the Company was entitled to assume that everyone can read nowadays, and having given a legible notice of the conditions to Parker, it was that gentleman's own fault if he did not read them.

Still, the Company must not throw the luggage about the station, or leave it outside, to invite passers-by to steal it. The Caledonian Railway had a condition on their cloak-room tickets that they would not be answerable for any luggage of more than £5 value “deposited in the Company's cloak-room or warehouse.” Mr. Hardon left his luggage with the porter at the cloak-room door, and received a ticket with such a condition on it. Owing to pressure of traffic the porter could not or did not take the luggage into the cloak-room, but left it kicking about on the platform. As might have been expected, someone bolted with it. The Company had to pay, condition notwithstanding, because the luggage had not been “deposited *in* the Company's cloak-room.”



I would say here, as in the case of a railway ticket, that possession of a ticket is only evidence of ownership. The ticket does not of itself give any right. Still less does the **loss of the ticket** take away the right to the goods. The owner of goods which are in a cloak-room is always entitled to them on proof of ownership.

And lastly, I would add that unless the ticket states the hours at which the cloak-room is open, the owner is always entitled to have his goods at a reasonable hour, and with reasonable celerity. He has just cause of complaint if he is kept waiting a long time. Cloak-room charges are not regulated by any general Statute.

## Book IV.

### THE LAW OF BORROWER AND LENDER.

#### SECTION I.

#### LOANS GENERALLY.

Lamb's classification of mankind—Two kinds of loans—With security—Without security—"Personal" security—A double meaning—Why money-lenders charge high interest—Do not "renew" a money-lending bill—5 per cent. may be 60—Usurious contracts—Spendthrifts with expectations—The expectant heir: Chancery's spoilt darling—No usury allowed in case of an expectant heir—Why?—On the ground of fraud—Age is no matter—Bonds for payment of money—No penalties allowed—Same in Scotland—Loans on security—Do not lend too much—Because it is risky—A loan is repayable at once unless a future date is fixed.

"THE human species, according to the best theory I can form of it," wrote Charles Lamb, "is composed of two distinct races—the men who borrow, and the men who lend." This section of *Cassell's Family Lawyer* ought, then, to be of the most universal interest, and especially to lenders; for some borrowers, it seems to me, care little about their legal position.

There are, roughly speaking, two kinds of loans. There is the loan without security, in which the lender trusts to the honour and continued solvency of the borrower; and there is the loan with security, in which the borrower makes over to the lender property of some kind, out of which the lender can repay himself if the debt is not repaid by the borrower. Another form of security is when the borrower procures someone to guarantee repayment of the loan. "If the borrower does not repay you, I will," says the guarantor: and so the lender has the credit of two persons to rely on, instead of the credit of the borrower only, as in the case of a loan without security. Sometimes these loans without security are called "loans on personal security," because the lender's only security for the repayment is the personal faith and credit of the borrower.

But the term "loan on personal security" has another meaning sometimes; to wit, occasionally, when you see "**Loans on personal security**" advertised by a money-lender. The term "personal," in English law, is properly applied to certain kinds of property. Roughly speaking, "personal property" is equivalent to the Scottish "movables," and means such property, goods and chattels as can be moved about, as distinguished from land and interests in land, which are called in England "real property," and in Scotland, "heritable property" or immovables. In the Book on Inheritances and Trusts I shall deal with this matter at greater length. In this place it is sufficient



to point out the broad distinction. If you were to apply to one of these benevolent "private gentlemen" who advertise money to be lent on personal security, you might find that this meant not the security of your personal word and credit, but the security of your personal property—for instance, your furniture. In other words, a bill of sale would be demanded.

It is, perhaps, hardly necessary for me to point out that a loan on personal security—that is, on no security at all—is a far different business from a loan that is secured in some way. Nobody but a fool would lend money without security as a matter of honest business. He might lend it to a friend, or to somebody to whom he desired to do a kindness—as a matter of philanthropy, that is. It is on record that the great Irishman, Dean Swift, used to lend small sums of money repayable, by easy instalments and without interest, to struggling tradesmen and poor people in Dublin. He had to give it up, however, because when he tried to enforce reasonably punctual repayment, his debtors began to revile him as a hard man.

When you lend money on personal security, the chances are that the man who borrows has no security to offer. Of course, I do not speak of the friendly loan of half a sovereign to the man who has come to the office and forgotten to bring his purse. He is almost certain to be a hand-to-mouth sort of man, without many resources. It is, therefore, a matter of speculation whether you ever see your money back. For the man may be made bankrupt, or he may die and leave little behind. Necessarily, then, the lending of money without security is a highly risky and speculative business, and anyone who carries it on is obliged, by every rule of economy, to exact high interest. As the Duke said, "High interest means bad security." And the converse is equally true—bad security means high interest. The money-lender has so many bad debts that he is sure to charge high interest in order to try to make the good debts keep him in pocket. So much in defence of the money-lender.

But what I have just written is not so much to excuse the cent.-per-center as to warn my readers against borrowing without security. **If you want an advance**, you can always get it at low interest if you have security to offer; for there is always plenty of money waiting for investment. Even if your only security consists of your household furniture, you can usually obtain a loan at from  $7\frac{1}{2}$  to 15 per cent., but not from the "private gentleman" who advertises in the newspapers. Beware of him! When you want to borrow, your best plan is to consult a respectable solicitor. Tell him if you have any property: a house, a bit of land, a reversionary interest under the will of your Aunt Eliza, your household furniture, your crop, your business even. And the respectable solicitor will very likely have a client with money waiting for investment, and you will obtain a loan at interest varying according to the class of security you have to offer. Thus, on mortgage of a house or land, you will probably have to pay from 3 to 5 per cent. per annum; on mortgage of a reversionary interest, from 4 to 8; on a bill of sale of your furniture, from  $7\frac{1}{2}$  to 15; the like on a crop. And if you have a fairly decent business, and wish to borrow money to put into it, someone can

frequently be found who will lend the money upon the terms of taking a share in the profits of the concern until the loan is repaid.

But do not go to a money-lender. His words may be fair and his manner specious, but he lives by the sucking of blood. His advertisement says 5 per cent., but it is almost always **5 per cent. per month**—or 60 per cent. per annum. And he knows the art of repayment by instalments. He says, "I will charge you 5 per cent. per month. Let me see. You borrow £20, repayable with interest in six months. That will be £26 to be repaid—£4 6s. 8d. a month." If you work this out, you will find that you are paying far more than 60 per cent. per annum. For the first month your interest is at that rate—£1 for the month on a loan of £20. The second month, you have only the use of £16 13s. 4d. of the money-lender's money, for you have repaid £3 6s. 8d. of the principal; and for that you ought only to pay 16s. 8d. interest. But you pay £1, which is at the rate of 72 per cent. per annum. The third month—having repaid £6 13s. 4d. of the principal—you ought to pay only 13s. 4d. interest, which is 60 per cent. on the amount unpaid; but you again pay £1, which is at the rate of 90 per cent. And so on the rate increases, until the last month, when, having paid back £16 13s. 4d. of the original sum borrowed, you ought only to pay (at 60 per cent.) 3s. 4d. interest; but you actually pay £1 for the loan of £3 6s. 8d. for a month, which is 360 per cent.! This view of the matter does not occur to many people. But it represents the facts, and is based on the simplest of arithmetical calculations. So you see that I am justified in warning you against money-lenders. They trade upon their knowledge of your necessities and your ignorance of the method of calculating interest.

Let me give you another piece of advice. If **ever you have the misfortune to borrow from a money-lender**, and are unable to repay the loan when it is due, do not upon any account borrow a second sum from him in order to repay the first, and do not renew bills. When you borrow from one of these gentlemen he generally gets you to sign bills of exchange or promissory notes for the amount. As soon as one of these bills or notes is overdue he informs you of the fact, and when you declare your inability to pay, he does not always put the screw on at once. Suppose you have given a bill in the first instance for £20, and he thinks you are good for more, he will say, in the most obliging manner, "Well! well! I won't press you, Mr. X. I will renew the loan with pleasure." And then he will draw up another bill, payable a few months ahead, for £25 or more, according to his belief in your ultimate ability to pay, and his opinion of your wisdom. There are so many people who are glad to postpone the evil day by renewing the loan that Mr. Financier plays up to their weakness.

It seems almost useless to expose the money-lender and his wiles. He always contrives to find victims. But I would point out that when a man of this class offers to accommodate you in any way, you should always be suspicious. Remember that his main—indeed, his sole object, is to get as much out of you as he can. And one of the ways is by renewing bills. You borrow [this is an actual case] £55; you sign a bill, payable in three months, for £100; at



the end of the three months you renew the bill for another three months by cancelling the first bill and signing one for £150. This is how the thing mounts up. You would be far better off at the end of the first three months to decline the proposal to renew. The utmost that could be done to you would be to put you into Court; from which time interest ceases to run. Moreover, money-lenders are not enamoured of legal proceedings.

**Usurious contracts and spendthrifts with expectations.**—In the days of long ago, the State, with the excellent motive of putting a stop to usury—that is to say, the charging of exorbitant rates of interest—passed laws to prohibit any lender from charging any borrower more than a fixed rate of interest. As the great Bentham pointed out, this interference with trade simply had the effect of sending up the rate of interest charged to needy borrowers, and to the practising of various devices to elude these Usury Laws. The usurer would not lend the spendthrift £50 and charge him 100 per cent. interest for the loan. He would lend him £50 and sell him two oil-paintings for £40 apiece, taking a bill at six months for £130 with 10 per cent. interest. The works of art would probably be worth about a crown the two; and the whole transaction was a device to evade the law. Bentham's strictures had the effect of causing these Statutes to be repealed, so that now usury is not illegal. A lender may charge 1,000 per cent. interest—he does sometimes; he may charge compound interest, or, in fact, anything the borrower is fool enough to agree to pay. To this rule, however, there is one exception, and that is in the case of

**Unconscionable bargains with expectant heirs.**—The English Court of Chancery loves expectant heirs. By these I mean persons who have what Dickens called "great expectations." For example, you are the favourite nephew of your Aunt Maria, whose means are considerable. It is well known in the family that when Aunt Maria is gathered to her fathers you will be the chief person named in her will. You are the expectant heir of your Aunt Maria. Now, suppose you run into debt, or have tastes too magnificent for the length of your purse, and you desire to borrow. It may be that you have lost a lot of money in speculating on the racecourse or the Stock Exchange, and require cash pretty promptly. An obliging friend knows a man who can, and probably will, "do" a hundred for you; or, it may be, you catch sight of the philanthropic advertisement of the private gentleman who, having a few thousand pounds to spare, is desirous of benefiting his fellow-creatures by lending the same to them with or without security, on note of hand merely. This is the man for you. You seek him out, and find him to be a pleasant gentleman, apparently of Israelitish extraction. You tell him that you want £200. He inquires who you are, what your business is, and what are your prospects. In this way he learns of your Aunt Maria. Then, having satisfied himself that you are likely to come into her money, he lends you £200, taking a bill for, say, £400, due in twelve months. At the end of the twelve months Aunt Maria is still in the land of the living, and you have not the wherewithal to meet your engagement. But the private gentleman does not wax unpleasant. He is quite willing to renew your bill on terms. Perhaps he even

lends you another £20, and you sign a new bill, due in six months, for £550. Probably the bill will be renewed several times, each time for a larger amount, until at the end of two or three years you owe the private gentleman £1,000, having received altogether perhaps as much as £250. Then Aunt Maria dies and leaves you £5,000.

By this time you begin to wish you had never made the acquaintance of the private gentleman, whose terms strike you as being slightly exorbitant. But now you reap the advantage of being the favourite child of the Court of Chancery. For this is what you can do. You can go to Mr. Shylock and offer him the amount he has actually lent you, together with 5 per cent. interest thereon from the date of the loan. If he refuses to take it, you may begin an action in Chancery to compel him to deliver up your note or notes of hand and any other security [you may have given him, upon your paying him the sums he has lent you and 5 per cent. interest. You may also have to pay his costs of the action, but that is in the discretion of the judge.

I know that this law will come upon my readers as a surprising piece of news. And certainly it does seem extraordinary that if I borrow money at an exorbitant rate of interest when I have no expectations of coming into property, I should be compelled to pay in full, while if I borrow on the strength of expectations, I shall be allowed to go behind my bargain in the way described. The law on the subject rests upon two reasons—(1) That the lender has taken undue advantage of the circumstances of the borrower; (2) That it is a fraud upon the person from whom the borrower derives his expectations. Thus, in the case given above, the Court considers it a fraud on your Aunt Maria, holding that she would never have left you the money had she known that you had discounted it in advance upon such monstrous terms.

The doctrine extends widely. It is for the **protection of expectant heirs of all ages**. Thus, in one celebrated case a man named Spencer, forty-five years of age, had expectations from some relative. Spencer borrowed considerable sums from one Jansen at high rates of interest, Jansen relying upon being paid when the relative died. When the relative did die, Spencer declined to pay what he had bargained to do, and set up that he was entitled to protection because when he borrowed he was an expectant heir. Jansen, not unnaturally, replied that Spencer, when he agreed to pay the high interest, was a man of full age and discretion and perfectly well able to take care of himself. But the Lord Chancellor would not have it. Age made no difference, he said. It was contrary to good conscience and public policy that an expectant heir should be allowed to borrow at enormous rates on the strength of his expectations; so Jansen was held to be entitled to the sums he had actually lent, with 5 per cent. interest, and no more.

In order that you may make no mistake, let me say that the expectant heir is entitled to be relieved from the consequences of his improvidence, whether his "expectations" were certainties or merely contingencies. For example, Jones's father dies, leaving his property to his widow for her life, and after her death to Jones. Jones here has a certainty that on his mother's death he will come into the property. He is still called an "expectant heir,"



and if he borrows on extravagant terms on the security of his reversion, he can claim to be relieved in the way described. Again, if, as in the case of your Aunt Maria, you merely have a hope that she will leave you something, you are an expectant heir.

Let me say, also, that the agreement to pay the high rate of interest must have been an unconscionable, exorbitant agreement to begin with. A money-lender is not unconscionable unless he charges a rate of interest so monstrous as to "shock the conscience," as it is generally put. For example, a loan at 10 or even 15 per cent. to an expectant heir would probably hold good. But the Court would shy at 60 per cent. and reduce it to 5.

Moreover, it is no use for the lender to try to evade the law by the device of "selling" worthless goods to his victims at fancy prices. Nor will it avail him to get the expectant heir to sign a document stating that a much larger amount has been lent than is actually the case. It is quite common for your Shylock, when he lends £50, to procure the borrower to sign a bond saying that the sum advanced was £200. The Court will—a most exceptional thing—allow the expectant heir to go behind the document that he has signed and prove that in reality only £50 was advanced. And if the heir is compelled, as part of the price of a loan of £100, to buy a dozen boxes of cigars, and give a bill for £400 altogether, the Court will inquire into the transaction and order the money-lender to be satisfied with his £100 and interest at 5 per cent. and a reasonable price for his havanas.

And again, the money-lender, when he lends, must know that the borrower is an expectant heir. Otherwise the transaction stands.

**Bonds for the payment of money** are deeds by which a borrower agrees that if he does not pay the loan back on a certain day he will forfeit a sum, as a penalty. This is the kind of thing:—

"In consideration of the sum of £50 advanced by Jones to Smith, Smith agrees to pay Jones £100. But if Smith, on the 1st of June, pays Jones £50 with interest at 10 per cent., this bond shall become void."

Which means that Smith is to pay £50 and interest on the 1st of June, and if he does not pay then, he is to pay £100. The interest on the £50 would amount [say] to £5. So that Smith is liable to a penalty of £45 for non-punctual payment of £55. Now, the Courts, in England, grant relief against penalties in bonds. And this applies in all cases whatsoever.

To take the instance given. If Smith does not pay his £55 on the 1st of June, and Jones tries to exact his £100, he will find that the plea, "it is so written in the bond," is of no use to him. The Court says, "You shall not exact a penalty. By the non-payment of the £50 and 10 per cent. interest on the 1st of June you have not lost £45; and you will not get it. All you will get is the £50 and 10 per cent. interest up to the date of signing judgment against the debtor." In other words, suppose Smith does not pay on the 1st of June, he is still entitled to redeem his bond by repaying the £50 borrowed and 10 per cent., the agreed rate of interest, up to date of payment. This is a decided "tip" for borrowers. Bonds have now gone out of fashion somewhat. Lenders generally take promissory notes or bills of

exchange, to which the above objection does not apply with so much force. At the same time, I think that if I gave a promissory note for £60, with £40 to be added in case I did not pay promptly, I should have no difficulty in persuading the Court that I ought not legally to be called upon to pay the £40.

In Scotland it is usual for personal bonds (*i.e.* without security) to run in this form. The borrower promises to pay the sum on a certain day with interest, and with (say) one-fifth extra interest if he does not pay promptly. Thus, say interest is to be 5 per cent., he agrees to pay 1 per cent. more for unpunctuality. But the Scottish Courts will only allow penalty interest up to the amount of loss and expense actually incurred by the lender in consequence of the borrower's failure to pay on the agreed date. And this, too, may be worth nothing.

The **very cheapest way to borrow money** is to borrow it upon the security of a mortgage, or "bond and disposition in security," as it is called in Scotland. This kind of transaction can always be arranged through a solicitor or writer; and the rate of interest will vary according to the class of the property upon which the loan is secured, the amount borrowed, and whether the loan is intended to be a temporary or long-standing one. There are always plenty of trustees who are only too glad to invest their trust funds upon the mortgage of real (in Scotland, heritable) property—that is, land. And the security of land [I include land which is built upon] is recognised by the law to be so sound that trustees are permitted to invest trust money upon it. When the law allows trustees to invest trust money upon any security, you may be sure that such a security is of the soundest kind; so that the security of landed property is not only the cheapest thing to borrow on, but **the safest to the lender to lend on**. As it is the fashion to say, "bricks and mortar cannot run away."

But even here it is necessary to **be careful not to lend too much**. What is too much depends very much on the particular circumstances of each case—as, for instance, whether the property mortgaged be an improving property or one depreciating in value. It is one thing to lend money on mortgage of a row of houses in a growing London suburb, like Hampstead, and quite another to lend it on mortgage of a farm in Essex. The thing for a lender to guard against is this. Should his interest not be paid when due, or should he want his principal back, and the borrower be unable to repay it, it may become necessary to sell the property. Now, unless that property sells for a sufficient sum to pay the expenses of the sale, the interest up to date, and the principal money lent, the lender loses. And you should never forget that on a forced sale property hardly ever realises its proper value. Therefore, if on a house valued at £500 you lend £450, and the borrower fails to pay half a year's interest at 4 per cent. (£9), and the expenses of the sale, auctioneer's commission, and legal charges of your solicitor amount to £30, you must sell that house for at least £489, or else you will lose by the transaction. The chances are that at the auction no one will bid £489 or anything like it, unless you happen to have hit upon a time when the property market is in a flourishing condition.



Another risk of lending so near to the full value of the property lies in the fact that as the borrower—the owner of the property—has so little margin left in it, he may not be very enthusiastic about clearing off the debt. Again, any property may depreciate in value through causes quite incalculable. Of course, it may rise in value. Thus, if a royal prince takes a fancy to a seaside resort, as George the Fourth did to Brighton, the fashionable world immediately discovers the hitherto unrevealed beauties and advantages of the place, and land in the vicinity probably rises in value by leaps and bounds. But when you lend money on mortgage you should never count on this. You should never even count upon the property maintaining its present value. Allow for depreciation: don't count on appreciation.

In fact, the only safe rule is, after having had the property valued, to allow (say) 10 per cent. for untoward eventualities, and then **lend not more than two-thirds of the value.** Thus, if I were asked to advance £500 on the security of a mortgage of a row of houses, I should ask for a valuation to be made. I should want to know the rental; whether the houses let readily; how long it was since they had been thoroughly repaired; what were the outgoings (if any) for tithe-rent charge, rates and taxes. Then, after estimating the value on this basis, I should deduct 10 per cent.; and if the value after that was not at least £750, I should not lend £500.

**When is a loan repayable?** Well, unless there is a day fixed, it is legally repayable at once. For example, if I lend you a £10 note, and we say nothing about the time when you are to return it, I can raise an action for it at once. I need not even ask you for the money; because, as I have explained once or twice already, it is the debtor's duty to go to the creditor and pay the amount due as soon as it is due. And as, when I lend you money it is due at once, my right is, as before stated, to take legal proceedings at any time.

I should like to mention here that a creditor can always insure his debtor's life; and it is frequently prudent for a **lender to insure the life of a borrower**, or to make the borrower insure in his own name and assign the policy to him. Professional money-lenders make a good deal of money out of insurances. Nearly every one of these gentlemen is an agent for a life insurance society, and when he lends money, he often insists upon the borrower having his life insured. He (the lender) introduces the business to his own office, and pockets the agent's commission. Thus, you borrow £200, and the lender insists upon your insuring for £400. You, of course, pay the premium, and he will get his commission on it—usually 1 per cent. on the amount insured—£4 in the case given. Consequently, it is to his interest to make you insure for a larger amount—a fact to be remembered if you are obtaining a loan. I say to you, do not be “rushed.”

## SECTION II.

## MORTGAGES AND BONDS AND DISPOSITIONS IN SECURITY.

The popular notion of a mortgage—Is Adelphian—What “mortgage” means—Mortgage of landed property—Important to investigate the borrower’s title—Form of a mortgage—Vast difference between form and effect—Borrower must give notice of intention to repay—Payment of interest—Punctuality—You must not tweedledum, but you may tweedledee—Remedies of lender if interest be not paid—Taking possession of the property—Appointing a receiver—Difference between creditor’s possession and appointing receiver—Rights of lender when loan not repaid—The power to sell the property—When it arises—Put up to auction—The surplus proceeds of sale—Second mortgages—Concealed mortgages—Foreclosing a mortgage—A long and painful process—Borrower everywhere favoured—Plenty of time to redeem—Equity loves not foreclosure—A legal romance—How to foreclose—Debtor loses his property in twelve years—Always take a formal reconveyance when you pay off a mortgage—If not, you will regret it—Borrower or lender, when in possession, may make leases—Fire insurance—Loans on deposit of title-deeds—When not advisable—Scots law: Bond and disposition—Power of sale—Manner of sale—Foreclosure: how different from English foreclosure—Notice to pay off bond—Sale in Scotland must be public: in England may be private—Mortgages of reversions—No money-lenders need apply—Hints to lenders on reversions

THERE are few subjects upon which more deplorable ignorance prevails than on the subject of mortgages, an ignorance the more surprising when one reflects that about four-fifths of the land of the United Kingdom is mortgaged. A great many people take their notions of the nature of a mortgage from the playwright. We all know the dramatic conception—how the hero, the noble-hearted, generous, but extravagant hero, borrows recklessly, and mortgages one after another the ancestral estates to the villain, who pretends to be his friend; how the said villain, aided by a rascally lawyer, waits until the hero is penniless, and then suddenly demands the repayment of vast sums; how, when the hero cannot pay—your true hero is never very good at paying—the villain forecloses, and is just about to turn the hero out of house and home, when the faithful comic friend puts in an appearance, accompanied by a friendly comic solicitor, who promptly finds a flaw in the mortgage deeds. And so the villain is routed, the heroine weeps tears of joy, the hero orders a parson and a wedding-breakfast, all to the loud applause of pit and gallery.

People who derive their knowledge of the rights and powers of a mortgagee from an Adelphi melodrama will be surprised to learn that there is no subject upon which the law is so tender as the rights of the mortgagor—that is, the man who borrows money and mortgages his property as security. It is a principle of the strictest application that a mortgagor shall not be deprived of his property, or the benefit of his property, if it can possibly be avoided. No creditor can ever foreclose of his own motion, however much the loan and interest may be in arrear. And the law takes the best of care that if the property mortgaged is of greater value than the sum due to the lender, the borrower shall get the benefit of the surplus. That is to say, if I mortgage £1,000 worth of land to Jones for a loan of £500, Jones will not in any



circumstances be allowed to foreclose—that is, to take the land and keep it. How the law protects the borrower will be found in this section fully dealt with.

“Mortgage” is a word literally meaning “dead pledge,” and it was so called for this reason:—In olden times if I borrowed money from you, and conveyed my land to you to keep in your hands as security until I paid back the loan, it was called a “vif gage,” or “live pledge,” if you were to receive the rents and produce of the land until such time as I paid back what I had borrowed. But if you simply held the land, but I, the owner, took the rents and produce, the land was said to be “dead” in your hands, and so the security was called “mort” (dead) “gage” (pledge). So you see this legal expression takes its origin from a mere figure of speech.

In modern times mortgages are not confined to land. You can mortgage practically any kind of property. And by “property” I do not mean landed estate, nor even tangible things. For example, my uncle dies, and leaves all his money to his widow for her life, and after her death to be divided between myself and my brother Harry. During the widow's lifetime Harry and I have no right to touch a single penny; but we have a property under the will, called a reversionary interest, and I can mortgage my share of that reversionary interest if I choose. Our property consists of a right—a right of future enjoyment, which will become a right of present enjoyment when the widow dies. All property really consists of rights, some greater and some less; but we very often apply the term not only to the rights, but to the things over which the rights are exercised.

I will first of all take the case of a **mortgage of landed property**, and discourse of the rights, duties, and liabilities of borrower and lender.

If Jones, the owner of land, wishes to borrow £200 from Smith on the security of the land, assuming that Smith is quite satisfied as to the value of the land, Smith calls in the assistance of his solicitor, who investigates the title of Jones to the land in question—that is, he examines Jones's title deeds, and so on, to find out whether the land really belongs to Jones. It may very well happen that the land is not Jones's at all, for Jones may have bought it from someone to whom it did not belong. Or again, Jones may have thought that he was the eldest son of his father, and his heir-at-law, and so have taken possession of all his father's lands, while in fact Jones's elder brother, whom everybody thought to have been drowned at sea, is alive and hearty, and is the real heir. It is the greatest folly in life to lend a man money on landed security until your solicitor has investigated his title. A man came to me the other day and wanted to borrow money on mortgage from me. I readily agreed to make the loan, provided the title turned out all right. “You might let me have the money now,” said he, “and I can sign the mortgage afterwards. I want the money as soon as possible, and it will probably be a week or two before the deed is prepared.” Now I did not doubt this man's honesty or good faith, but I did not give him the money down. I pointed out to him that until his title had been investigated I could not tell whether the security offered was worth anything or not. Unknown to him, it might be worth



**This Indenture**

made the twelfth day of March  
One thousand eight hundred and  
ninety eight **Between** William  
Brown, of 108 Sumala Road

West Ham in the County of Essex Saddler (hereinafter called  
the Mortgagor) of the one part and Samuel Taylor, of 108  
Sumala Road in the County of London Fruit Merchant (hereinafter  
called the Mortgagee) of the other part **Whereas** the Mortgagor,  
is seized of or otherwise well entitled to the hereditaments hereinafter  
assured for an Estate in fee simple in possession free from  
incumbrances **And whereas** the Mortgagee has agreed to lend  
to the Mortgagor the sum of Eight hundred pounds on having  
the same secured in manner hereinafter appearing **Now this**  
**Indenture witnesseth** that in consideration of the sum of  
Eight hundred pounds now paid by the Mortgagee to  
the Mortgagor (the receipt whereof the Mortgagor hereby  
acknowledges) the Mortgagor covenants with the Mortgagee  
that the Mortgagor will on the twelfth day of September next  
repay to the Mortgagee the said sum of Eight hundred pounds  
with interest thereon in the meantime at the rate of Four pounds  
per centum per annum **And this Indenture also**  
**witnesseth** that for the consideration aforesaid the Mortgagor  
hereby grants to the Mortgagee **What** Messuages houses  
and Shop known as 15 Clapperton Row in the Parish of St. Mary Islington  
in the County of London **to hold** the same unto and to the use  
of the Mortgagee in fee simple **Provided always and**  
**it is hereby agreed and declared** that if the Mortgagee  
shall on the said twelfth day of September next pay to  
the Mortgagor the said sum of Eight hundred pounds with  
interest as aforesaid then the Mortgagee shall at any time thereafter  
at the request and cost of the Mortgagor reconvert the premises  
hereby assured to the Mortgagor his heirs and assigns or as  
he or they shall direct **And the** Mortgagor for himself  
his heirs executors administrators and assigns doth hereby covenant  
that if the said sum of Eight hundred pounds or any part  
thereof shall remain unpaid after the said twelfth day of  
September next he and they will so long as the same sum  
or any part thereof shall remain unpaid pay to the Mortgagee

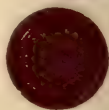
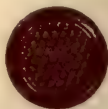


his executors administrators or assigns interest on the sum so  
remaining unpaid at the rate of Four pounds per centum per annum  
by equal half yearly payments on the twelfth day of September and the  
twelfth day of March in each year *In witness* whereof the said  
parties to these Presents have hereunto set their hands and seals  
the day and year first hereinbefore written

Signed Sealed and Delivered  
by the said William Brown in the presence  
of Alfred Jones, 114 Sumner Road,  
Clerk.

William Brown

Samuel Taylor



Signed Sealed and Delivered  
by the said Samuel Taylor in the  
presence of

Mary Williams, 114 Clifton Place, W.  
Draper's Assistant

nothing. Wherefore, don't advance the money first and investigate the title to the security afterwards. Get your lawyer to investigate first, and don't part with a sixpence until he tells you it is safe to do so.

When you lend your money, your lawyer draws up a deed to this effect:—

(1) Smith pays Jones £200.

(2) In consideration of this, Jones promises to repay the £200, with [4] per cent. interest, this day six months.

(3) Jones makes over to Smith the piece of land with three cottages thereon called 1, 3, and 5, High Street, Great Pudlow.

(4) So long as any of the £200 remains owing, Jones shall pay to Smith [4] per cent. interest thereon by equal half-yearly payments on the first of January and the first of July each year.

(5) If Jones pays back all that he owes on the day appointed, Smith will reconvey the piece of land and three cottages back to him.

I do not give you the exact form of a mortgage, because it must necessarily vary in almost every case, but I give you the general effect of one.

Now let me explain **the position of borrower and lender under a mortgage deed**. In the first place, the borrower always agrees to repay the loan and interest on a particular day—generally six months after the date of the deed. And the lender only agrees to reconvey the land if the money is so repaid. But, all the same, it is never intended that the loan shall be one for six months only. Generally when a man lends on mortgage he does not want his money back in six months. He wants to invest his money, and derive an income from the interest. And the borrower, on the other hand, does not want to be debarred from redeeming his property at the end of six months.

Be comforted. This is only the form of the deed; and **there is a vast difference between the form and the effect of a mortgage deed**. For the borrower cannot repay the loan without first giving **six months' notice of his intention to pay it off**. If he particularly wishes to redeem his property at any time, he can, instead of giving six months' notice, pay six months' interest in lieu of notice, and demand an immediate release.

Again, even though the borrower does not pay back the money on the day named in the deed, he does not lose his property. He has the right at any time to repay the loan and interest up to date and demand his property back—subject, of course, to giving six months' notice of his intention to redeem.

At the same time the lender (mortgagee) has his rights. What are they? Well, they are these—to have his interest paid when it is due (generally either quarterly or half-yearly), and to have his principal back when he requires it. Let us now see how he can enforce these rights.

**Interest must be paid**; and it is to the lender's advantage to have it paid with promptitude. Let me tell lenders how to secure that desirable end. Suppose you agree to lend a man £500 at 4 per cent. on mortgage, interest payable half-yearly on the 1st of January and 1st of July. Have a clause put in the deed to this effect:—Interest shall be at 5 per cent.; but if it be



paid not later than four days after it is due it shall be reduced to 4 per cent. You thus make it to the borrower's advantage to pay promptly. You must be careful not to do it in the wrong fashion. For if you stipulate that interest shall be at 4 per cent., but shall be increased to 5 per cent. if it be not punctually paid, the agreement is bad. Why? Because English equity does not allow **penalty interest**. It allows you to reduce from 5 to 4 on punctual payment, but not to increase from 4 to 5 on unpunctual payment.

Now, suppose **the borrower falls behind in payment of interest**. The lender has several remedies. (1) He can take legal proceedings for the interest, just as for any other debt. (2) He can take possession of the property; by which I do not necessarily mean that he need go and occupy the land himself. I mean that (for instance) if there are half a dozen houses he can give notice to all the tenants to pay their rent to him. If they don't, he can put them in the Court. He must not distrain (*see pp. 142 et seqq.*) like an ordinary landlord until the tenant has acknowledged him as landlord. For instance, you (the lender) send notice to the tenant Brown. Brown says, "I don't know you, and I shall not pay you." You must proceed in the Court for the rent. But if Brown says, "I will pay you, but I cannot pay to-day because I am short of money," you can treat him as an ordinary tenant, and distrain for the rent. (3) He (lender) can appoint a "receiver of the rents and profits" of the property. A receiver, as his name would imply, is a person who receives. He gives notice to all the tenants to pay their rents to him; and out of the money he first of all pays himself a commission for his trouble—generally 5 per cent. Secondly, he pays all outgoings, such as landlord's rates, taxes, etc., fire insurance premiums, and so on. Thirdly, he pays the lender's interest as it becomes due; and fourthly, he either applies what remains towards paying off the principal of the loan, or else hands it over to the borrower. (4) The lender can sell the property if interest is in arrear for twenty-one days. I will deal more fully with the mortgagee's power of selling the mortgaged property, on a subsequent page.

What I want to show here is **the difference** between the lender himself going into possession, and appointing a receiver. **When the lender himself goes into possession**—that is, collects the rents, or takes the profits of the property by himself or his agent—he does not simply put those rents and profits into his pocket. He is strictly accountable for them to the mortgagor (borrower). He is, in fact, almost like a trustee. For it must never be forgotten—and this is the cardinal rule governing the law of mortgages—that a mortgagee is only entitled to the repayment of the sum lent and interest thereon at the agreed rate. So that all he can do, if he puts himself in the position of owner, and collects the rents, is to pay himself his principal and interest. He is bound to render a strict account, to the uttermost farthing that he has received. He is bound to use all due diligence in collecting rents. He must let the property, not for anything he pleases, but for the best obtainable rent. He must not allow tenants to run into long arrears. On the other hand, he cannot charge any commission for his trouble in collecting the rents and managing the property. He cannot charge anything

for his loss of time in connection with the matter, nor even his expenses in going round to collect the rents.

But **when he appoints a receiver** the case is far otherwise. The receiver is then responsible to the mortgagor (borrower) for the proper management of the property, the due collection of the rents, and the application of the proceeds (*see above*, p. 906). The mortgagee is under no liability at all. And the receiver can charge a commission for his trouble. Anybody (except the lender himself) can be appointed as receiver.

Now let us see what are **the rights of the lender when the loan is not repaid** at the proper time. Take this case: You have lent Jones £500 on the mortgage of two houses. Jones pays the interest promptly enough; but in course of time you want your £500—no matter why. The point is that you want it. What are you to do? You must first of all give Jones three months' notice that you require repayment. A note like this will do :—

"To John Jones, Esquire.

July 1, 1898.

"Take notice that three months from the receipt of this notice I require you to repay me the £500 due to me under the mortgage deed of June 24, 1889, made between us, with interest to date.

THOMAS SMITH."

Send the notice by hand, or by registered post.

Now, suppose Jones does not pay at the end of three months, you have three rights. You can bring an action against him for the £500 and interest. This is rarely done; because if Jones had the money he would have paid you to save expense and loss. The second and most usual course is to sell the property. This is such an important subject that I will take a fresh paragraph for its discussion.

**Sale of the property by the lender.**—As already stated, the right of a mortgagee to sell the property mortgaged to him arises in one of two ways; namely, (i) when interest due is in arrear for twenty-one days; (ii) when, after giving three months' notice that he wants to be paid off, the borrower fails to pay. There is also another occasion: (iii) when the borrower himself has given notice (six months') that he intends to repay the loan and then does not pay. Here the lender can sell, because he is supposed to have looked out for and found another investment for his capital.

I ought also to say that these three occasions are those given by the law. But the borrower and lender may agree to other terms if they like. For instance, it may be agreed that the lender must give six months' notice instead of three. And I have seen many deeds in which it has been agreed that the lender can sell at any time, without giving any notice, even though there is no interest overdue. These agreements, however, are quite exceptional.

When the lender exercises his right to sell, it is his bounden duty, not only in common fairness and honesty, but also by the strict law of the land, to sell for the best price he can obtain. The usual way is to put the property up to auction. The sale ought to be well advertised and properly conducted. For instance, a mortgagee who allowed the property to be knocked down as soon as the bids reached a figure sufficient to pay him, though somebody



else was ready with a higher bid, would get into serious trouble. Again, the mortgagee (lender) must not bid himself, either openly or through an agent; for it is a strict rule that a mortgagee selling the property shall not be allowed to buy it himself. This is to prevent fraud. For it is his duty to sell for as much as the property will fetch; and if he himself buys, it is his interest to buy it for as little as possible. And the law does not like a man to have an interest which conflicts with his duty.

The sale is made. The property is knocked down for £800. I take the illustration with which I started—a loan of £500. From the £800 you are entitled to deduct the expenses of the sale—which are, £10 for advertising, and £20 for the auctioneer's commission. Then three months' interest is due to you—£5; and £500 principal. £10 + £20 + £5 + £500 = £535; leaving £265 in your hands as trustee for the borrower. This is to be paid over to him.

Suppose the property does not realise enough to pay the loan and interest after deducting expenses of sale, the debtor is liable personally for the balance. But stay! **There may be other mortgages** on the property. Some of you, I daresay, know that a man may mortgage the same land over and over again, as long as ever he can get anyone to lend money on it. Thus, he mortgages to you for £500; then he borrows £200 from Brown, and gives him a second mortgage; then he secures another £100 from Robinson, and gives him a third mortgage. When he mortgaged to Brown, Brown's solicitor would want to know where the deeds were, and on being told that you had them, he would ask you why, and you would tell him that you held them as mortgagee. Upon which Brown's lawyer would give you notice that his client had a second mortgage for £200. And in all probability you would receive another notice as to Robinson's £100. In such a case, you having sold the property and received £765 after deducting expenses of sale and your own interest, you deduct your own £500 and then pay the balance to the other mortgagees in their order of date. Thus, Brown wants £200, and half a year's interest at 5 per cent. (£5); leaving only £60 for Robinson, to whom you pay it. So that Robinson's security having gone, he must rely on bringing an action at law for the balance of his loan and interest.

This little illustration may serve to you as a warning, never to lend money except on first mortgage, unless property is very valuable and the previous loans are of small amount. Be warned by the fate of the aforesaid Robinson.

**Concealed mortgages, several mortgagees, and fraudulent borrowers.**  
—Brown has a piece of land, the which he mortgages to Jones for a loan of £1,000. The mortgage is in the ordinary form, namely, by deed. The effect is to make Jones the legal owner of the land—subject to Brown's right to redeem it, and have a re-conveyance when he repays what is due. Then Brown borrows £200 more on the further security of the land from Roberts, who is called the second mortgagee. Then he borrows a further £200 on the same security from Townsend, telling him nothing about Roberts's mortgage. Roberts has never taken the trouble—which was foolish of him—to inform Jones, the first mortgagee, of his mortgage. So that when Townsend

makes inquiries, he is told that as far as Jones knows, there is only one mortgage, namely, his (Brown's). After lending the money, Townsend makes further inquiries, and discovers the fact of Roberts's intermediate mortgage. This is awkward; because Townsend would never have lent the money on a third mortgage, had he known. Well, he can still protect himself. He can buy up Brown's first mortgage, and tack his own to it, so giving his third mortgage priority over Roberts's second. Then, if the property is sold, and only realises (say) £1,300 after paying expenses of sale, Townsend takes the first pull to the tune of £1,200 and any interest that may be due, and Roberts must be content with the balance.

Townsend cannot do this unless he lent his money on the security of the land without knowing that Roberts was in front of him.

Now it is very unpleasant for Roberts, who, in point of time, was second, to be postponed to Townsend, who was third. How is he to protect himself? Well, his only way is, as soon as he has lent his money, to give notice of the fact to Jones, the first mortgagee. Send him a formal notice that by a deed dated such a day, Brown mortgaged his estate to you subject to his (Jones's) mortgage. You see, Jones, as first mortgagee, will have the title-deeds of the land in his possession; and when anyone else intends to lend money on a subsequent mortgage he will naturally go to Jones to look at the title-deeds; and if Jones keeps your notice amongst the papers, as he probably will, the person looking at the deeds will see that there is another mortgage. In that case he cannot, by any possible means, put his third mortgage in front of your second.

**Foreclosure—Property forfeited to the lender.**—The last remedy of a mortgagee—or lender—is to foreclose. This word, "foreclose," is one in frequent use; but I doubt if many people have either a just notion of its meaning, or any notion of the great restrictions upon it. To foreclose means that the lender takes the mortgaged property, and becomes the absolute owner of it in satisfaction of the loan. The borrower can no longer redeem it—that is, he can no longer go to the lender, pay him what is owing, and have his property back. Some people are under the impression that, when the day of repayment arrives, the lender may walk in, say "Pay me what thou owest," and on the borrower being unable to comply with the demand, the lender may thrust him out of his property, and take it as his own for evermore. This is the Adelphi-drama notion, but it is a popular delusion.

**You can never foreclose without an action at law**—that is to say, no creditor can, without an order of the Court, take the mortgaged property for his own. It used to be otherwise, but not for the last three centuries; and the history of the alteration is one of the romances of our law. I have read somewhere that in the reign of the British Solomon, a gentleman of the North of England had borrowed £500 from a money-lender in London, and had mortgaged to the lender his ancestral estates in (I think) Yorkshire. The security was ample, for the estates were worth twenty times £500. Now the terms of the mortgage were that the loan and interest were to be repaid, in London, on a certain day. Several days before the



time, the Northern squire collected all his rents, put into a bag the moneys to satisfy his creditor, and sent them in charge of a trusty servant to London. "See thou tarry not by the way," said the squire, "for the day is peremptory. Spare not horse or man; for this bag of gold must be in the hands of Shylock on Christmas Eve." And so the servant rode forth. But the way was long. The roads were bad. The horse fell lame. And mayhap the servant was not altogether diligent. At all events, he arrived in London an hour or two late. Immediately he posted to his master's creditor, knocked him up, and offered him the money. But the lender would not take it. "Too late," said he. "You ought to have come yesterday." For the lender was greedy, and thought it good business to acquire a £10,000 estate at the price of £500.

The poor squire was in that frame of mind vulgarly called "terrible"; and in his dilemma he sought the advice of his family lawyer. That worthy thought the matter over, and then delivered himself thus: "There is no doubt that by the strict rule of law you have forfeited your estate. But there is in England a kind of law called Equity, administered by the Lord Chancellor; and Equity has the will, and can find the way, to relieve against all forfeitures, and to cause contracts to be performed according to their intent rather than their strict form. So I advise you to go to the Lord Chancellor." Wherefore the squire presented his petition to the Lord Chancellor in his Court of Chancery, and the greedy creditor was summoned to appear; and when he got there, the Chancellor asked him if it was true that all the money due to him was £500 and a small sum for interest. The lender admitted that such was the case. "Then," said his lordship, "how will you be damnified if you get your £500 and interest up to to-day?" "It is not so written in the bond," the lender replied. "Not so *written*, I daresay; but what was the real contract? Surely it was that the land should only be security for the money lent—not that it should virtually be sold to you for one-twentieth part of its value. The real liability of this worthy squire is to repay you what he borrowed, with interest. So long as he is ready to do it, even though he is late, he must have his land back. As for you, Mr. Shylock, you had a right to your money on the proper day. You did not get it. But the only damage you suffered was in not being able to lay it out at interest again on that date. Therefore I order the borrower to pay you interest for the period in which he was in default."

From that time forth it has been the law that the borrower can always redeem the mortgaged land upon paying principal and interest—subject to the rule hereafter set forth as to twelve years (*see page 911*).

It is thus evident that the English Courts do not look with favour on foreclosure. Still, they do allow it, subject to many safeguards for the borrower's protection. In Scotland, also, foreclosure was never favoured; and, indeed, was not allowed by the Courts until sanctioned by an Act passed in 1894. (For Scots law *vide infra*, p. 914.)

What are the provisions for the borrower's protection? Let me take a case. Jones lends £1,000 at 4 per cent. to Brown, on mortgage of a house.

After the first year, Brown ceases to pay the interest, so Jones appoints someone to receive the rent and pay him. Then Jones wants his £1,000, and gives the three months' notice to Brown to pay him off. Brown either cannot or will not do so; whereupon Jones puts the property up for sale (*see* p. 907) at the reserve price of £1,200—enough to cover him. But nobody will bid more than £600, and the house remains unsold. It is of no use to take action against Brown personally, for he is notoriously a ruined and impecunious man. Jones thinks that if he could become the owner of the property he might improve it and make it worth his while to keep it; so he tries to foreclose.

**How to foreclose.**—For this purpose it is necessary to bring an action for foreclosure; and of course Jones will employ a lawyer for the purpose. It can be done pretty quickly and fairly cheaply nowadays. On its being proved that Brown has mortgaged the property, and that money is still owing on it, the Court will order an account to be taken of how much is owing for principal and interest. To this will be added the costs of the action. Then an order will be made that if Brown does not pay the total sum (principal, interest, and expenses) in six months, the property shall belong to Jones absolutely. The debtor, you see, has plenty of rope.

If Brown is able to persuade the judge that the property would sell for enough, or more than enough, to cover the sum due, the judge will order the property to be put up for auction at the reserve or upset price of principal, interest, costs of action, and expenses of sale. If this be bid, and no more, the property is sold, and Jones gets all his money. If more be bid, then the surplus will go to Brown. Again, you see, every precaution is taken to protect the debtor. If less than the reserve be bid, the property is withdrawn, and Jones keeps it, subject to Brown having six months' grace to rake the money together, if he can.

I wish you to observe how far this is removed from the Adelphi-drama notion. So far from the law giving the mortgagee power summarily to turn the debtor out, the rule is entirely the other way. The law protects the borrower in every possible way, and only allows him to be deprived of his property when there is no other way of satisfying the debt due. In every case the course most beneficial to the borrower is adopted. So much is this so, that **even after his six months of grace have expired**, and the estate has become the absolute property of the creditor, the Court, on its being shown that any hardship has arisen, will allow the debtor to re-open the whole question, and frequently will permit him to redeem his property. Of course—and this is only just and fair—he must repay the loan, and also pay the interest and the expenses of the creditor.

But although the law of England allows a great deal of latitude to a man who has mortgaged his land, and treats him on the footing of the most-favoured-nation, there are limits. If the mortgagee (lender) goes into possession of the property, and remains in possession for **twelve years without receiving principal or interest from the borrower**, and without giving any written acknowledgment of his title to the borrower, the land becomes the absolute



property of the lender. Thus, I mortgage my land to you in 1888, and continue to pay interest until December 25, 1892. You go into possession of the property, and receive the rents from that date. I do not pay any more interest, nor do anything to pay off the loan. On December 25, 1904, the property will become yours; and even if I offer you the loan and interest, you need not accept it, nor give me my property back.

**The rule cuts both ways;** for if the borrower himself remains in possession of the property without paying interest or principal for twelve years, the property becomes his own again, free from the mortgage. In other words, while an ordinary debt is cancelled in six years unless it is kept alive by some payment on account or some acknowledgment by the debtor, a mortgage debt is cancelled in twelve years.

When you borrow money on mortgage, and then pay it back, it is **most important to take a proper reconveyance**. It is not enough merely to take a receipt "in full discharge." You ought to have a proper deed of reconveyance drawn up by a solicitor. This is not because the lender will ever be able to come down on you for the money twice over, but because if you do not have your land legally reconveyed to you, it will cause you no end of trouble if you ever wish to sell it or mortgage it again. And it will also almost certainly put you to considerable expense—two or three times as much as if you had taken a reconveyance at once.

**While the borrower continues in possession** of his property he can make leases or grant tenancies of it, but not to the same extent as though he had never encumbered it with the mortgage. Thus, he can make a lease for occupation or agricultural purposes—*e.g.* house, shop, warehouse, and farm leases—for not more than twenty-one years. The lease must be by deed. It must contain all the covenants usual on the tenant's part in such leases, together with a condition that if the rent be not paid, or any tenant's covenant be broken, the landlord may re-enter and forfeit the lease (*see pp. 155 et seqq.*). Moreover, the rent must be the best obtainable—*i.e.* not a nominal rent—and must be reserved to be payable not longer than half-yearly. That is, it may be monthly or quarterly, but not yearly. The idea is that the borrower shall not be able, by making reckless and foolish leases, practically to take away the lender's security. **When the lender goes into possession of the property,** he has a right to make similar leases.

**Insurance against fire** is a necessary precaution in the mortgage of house property; for if the house is burnt down, your security is practically worthless. So it is generally agreed in the mortgage that the debtor shall insure the property in some insurance office to be approved by the creditor, and pay the premiums punctually. If he fails to do this, the lender may insure and pay the premiums, and add the amount to his loan.

**Loans on deposit of title-deeds.**—Many business men know that if a man has landed property, and wants money in a hurry, he can generally get it from his banker by the simple process of taking his title-deeds to the bank and depositing them there, by way of security for the money lent. The effect of the deposit is to create a kind of mortgage over the property comprised in the

deeds deposited; so that if the borrower does not repay the loan, the banker can ultimately have the property sold to satisfy the debt. The lender need not necessarily be a banker. For example, if you wanted money in a hurry, and came to me with the title-deeds of an estate, and I lent you money on the deeds, I should have the same rights as a banker with whom you might deposit them.

\* This is another way of obtaining money on easy terms, and without any (or very little) expense for lawyer's fees; but it is not advisable to do it in such an informal way except when the loan is a temporary one. For example, if you wanted to borrow money for a month or two, or to pay me back as soon as possible, I would take the deposit of your deeds as security; but if we contemplated that the loan should remain for any length of time, I should want a proper legal mortgage by deed.

The **Scottish bond and disposition in security** is very similar in essentials to the English mortgage. It consists of (1) a promise or bond by which the borrower agrees to pay the sum borrowed, with interest, on a certain day, generally either Whitsunday or Martinmas, the Scots term days. He also agrees to pay interest half-yearly on Whitsunday and Martinmas so long as the loan remains unpaid, with what is called penalty interest in case the interest is not paid punctually. It should be observed that when the debtor agrees to pay penalty interest, the penalty can only really include the actual expense, loss, and damage incurred by the lender owing to the unpunctuality. (2) The bond goes on to "dispose"—that is, to convey and make over to the creditor the property in question, as security for the fulfilment of the debtor's promise to pay principal and interest.

The debtor always gives to the creditor **power to sell the mortgaged property**; whereas in England the creditor has the power given to him by law. When can the lender sell the property? This is an important question. Well, first of all, the creditor must give the debtor notice to pay off the debt in three months, with an intimation that if he does not pay, the property will be sold. This notice must be in writing, and must be given to the debtor personally, or left at his dwelling by the creditor or his procurator in the presence of a notary public and two witnesses. After the three months have expired, if the property is not redeemed, the security is to be put up for sale by auction. The **sale must be advertised** for six weeks in one newspaper published in Edinburgh or Glasgow, and also in one paper published within the county where the bonded property is. If there is no newspaper published in that county, then an adjoining county paper will do. The point is that the auction [roup] cannot take place until six weeks after the first advertisement is published. There should always be an upset price of the amount of the bond, *plus* interest and expenses.

The **place of sale** may be either Edinburgh, Glasgow, the head burgh of the county, or the nearest police or Parliamentary burgh, whether in the county or not. Of course, the idea is to prevent any hole-and-corner work.

If the sale takes place, and there is more than enough to pay off the bond and interest and expenses of sale, the **surplus** belongs to the debtor. The



articles of roup should name a bank where the purchase-money is to be paid, and into that bank the surplus goes in the names of the seller and purchaser. If there were other bonds or charges on the property, they will be paid first, and any balance will go to the debtor. If there is no surplus, a certificate must be had from the Sheriff; but this is a matter for a solicitor or writer.

It may happen that no one is willing to buy the property, or, at all events, to give the upset price for it. Then comes in **a power to purchase by the creditor**, a new power somewhat analogous to the English foreclosure. Having failed to sell, the creditor may apply to the Sheriff of the county where the property lies, showing that he put the property up for sale at the upset price of loan, *plus* interest and expenses, and failed to sell, and asking that he (the creditor) may be declared to be the owner of the property at the upset price. The Sheriff may either grant a decree to this effect, or order the security to be exposed for sale again, at an upset price fixed by him (the Sheriff). The creditor has leave to bid; and if he bids the upset price, and no one bids more, he becomes the absolute owner, and the borrower loses his estate. If the upset price is less than the sum due under the bond, the lender may sue the borrower for the balance of the debt by ordinary diligence in the Sheriff's Court or the Court of Session.

In England, on the other hand, if a creditor takes the mortgaged property as his own (foreclosure), the mortgage debt is wiped out, and the borrower is under no further liability whatever.

Again, in Scotland **the debtor can repay the loan** and clear off the bond upon giving three months' notice or three months' interest to the lender, instead of six as in England.

I would add that in England a mortgagee need not sell the property by auction. He can sell by private contract. In Scotland he must offer it at a public roup.

**Mortgages of property other than land** are often made. In fact, you can mortgage any property whatever except a title or dignity.

One of the most usual is that of a mortgage of a **reversionary interest**, described on pp. 897-9. Let me here say that there is no earthly reason why a man who borrows on a reversionary interest should pay an exorbitant rate of interest. Such a reversion is, as a rule, very good security if the reversioner who borrows is healthy enough to obtain an insurance on his life.

Let me show you what to do. Your Uncle Tom has left his property (worth £1,000) to be divided between you and your brother after the death of Aunt Matilda, who is sixty years of age. You want money now. If you go to a respectable solicitor, he will arrange for a loan on the security of your reversion. But as there is a chance that you may die before Aunt Matilda—in which case your interest will probably vanish—you will have to insure your life, and assign the policy to the lender as additional security. You ought to get it for from 4 to 7½ per cent. But if you are so delicate that no office will insure your life, you will have to pay much more, because of the extra risk to the lender.

**Hints to lenders on reversions.**—Before you make such a loan, be careful to inquire from the trustee of the property whether the would-be borrower has

FORM OF BILL OF SALE.

**This Indenture**

made the twelfth day of December  
(one thousand eight hundred and  
ninety nine) Between

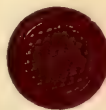
Phineas Oaklow of St. Eleanors in the City of London  
of the one part and Alfred Edward Benjamin of  
118 Canon Street Deptford in the County of Kent Financial Agent  
of the other part Witnesseth that in consideration of the sum  
of Forty pounds now paid to the said Phineas Oaklow  
by the said Alfred Edward Benjamin the receipt of which the said  
Phineas Oaklow hereby acknowledges He the said Phineas Oaklow  
Doth hereby assign unto the said Alfred Edward Benjamin his  
executors administrators and assigns All and singular the  
several chattels and things specifically described in the Schedule here  
annexed by way of security for the payment of the sum of Forty pounds  
and interest thereon at the rate of Twenty per Cent. per Annum And  
the said Phineas Oaklow doth further agree and declare that he will  
duly pay to the said Alfred Edward Benjamin the principal sum aforesaid  
together with the interest thereon by equal payments of Two  
pounds on the first day of each month the first payment to be made  
on the first day of January next Provided always that  
the Chattels hereby assigned shall not be liable to seizure or to be  
taken possession of by the said Alfred Edward Benjamin for any  
cause other than those specified in Section 7 of the Bills of Sale Act  
(1878) Amendment Act 1882 In witness whereof the said  
parties hereto have hereunto set their hands and seals the day  
and year first hereinbefore written of

Signed Sealed and Delivered  
by the said Phineas Oaklow in the  
presence of . . . . .

Phineas Oaklow

Isaiah Glückstein  
15 Salubritas Crescent

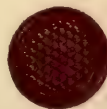
Deptford, ss.  
Shoemaker



Signed Sealed and Delivered  
by the said Alfred Edward Benjamin  
in the presence of . . . . .

A. E. Benjamin

Sarah Chiffes  
7 Alabaster Tenements  
Deptford ss. Gunster.





# The Schedule above referred to

Goods and Chattels at 15 Witting Street Greenwich

In front Parlor, 1 Dining Table, Mahogany, 6 Chairs Mahogany hair, 6 Pictures various subjects, Brass Fender and set of Fire irons, 14 pieces, and dogs, 1 small octagonal table, Walnut, 1 Cottage Piano by Mansons N: 489763. fine Brussels carpet In Back Parlor. fine Brussels Carpet, door mat, Fender (Steel) Set fire irons and dogs, 3 pictures in frames Round Table, Walnut, small table Mahogany, sideboard stained mahogany, 3 Armchairs stuffed hair, leather covered, 2 Occasional Chairs Ebony, 1 Settee.  
Kitchen, Deal table, 15 Saucepans, fender (Steel) and set Fire irons, 2 Windsor Chairs Front Bedroom Brass Bedstead, Spring and hair mattress and bedding Chest Drawers (Mahogany) Wardrobe, deal Washstand (marble top) Jug and Basin, Dressing table (rosewood Duchesse pattern, Commode and 2 Canv-seated Chairs Middle Bed room, Iron and brass Bedstead Spring and hair mattress and bedding. Chest of Drawers deal painted, Wardrobe ditto, Washstand and dressing table ditto Commode 3 Canv-seated Chairs, 3 Globes, Back Bedroom Iron Bedstead wool mattress, Shaw paltasse and bedding Chest of Drawers (deal) Washstand Jug and basin.

Solomon Gluckstern.

Phineas Oaklow

Leah Giffers

A. E. Benjamin.

previously encumbered his estate. Then, as soon as you have made the loan, give notice to the trustee. Give notice at once. This obliges him to see that you are paid when the borrower comes into the money. Again, remember that you run a great risk by lending on a reversion when the borrower does not insure his life. Always agree with him to show you his receipts for premiums, so that if he does not pay, you can yourself save the policy from lapsing.

### SECTION III.

#### BILLS OF SALE.

**What a Bill of Sale is**—Not known in Scotland—How Legislature has stepped in to prevent fraud by secret bills of sale—All bills of sale must now be registered—Anyone may inspect the register—Re-registration every five years—Bills of sale for borrowed money must be in a certain form—Must not contain any other provisions—Form of Bill of Sale—Must be attested by a witness—How to register—Must contain correct address and description of debtor and witness—Goods must be specifically described—Only goods in present ownership can be mortgaged—Except plant, machinery, and trade fixtures—When the goods can be seized—Only for six causes, and no others—Removal and sale of the goods by the creditor—Five days' grace allowed—The landlord's rent, Queen's taxes and local rates override bill of sale—Sometimes trustee in bankruptcy can claim the goods—Practical advice to borrowers whose goods have been illegally seized.

**A Bill of Sale**—which is not a Scottish institution, but an English one—is a deed by which the owner of goods and chattels—that is, movable property, mortgages them to a creditor as security for a loan. It is different from a pledge in this respect:—If you pledge or pawn goods, you hand them over to the lender to be kept in his possession until you have repaid the loan. Moreover, the creditor does not become the owner of the thing pawned or pledged. For instance, if I pawn the books in my library to cover a loan of £10, I merely hand over the books to the lender, giving him only a right of possession. But if I borrow money on a bill of sale of my books, I make the lender the temporary owner of these books, giving him the right to seize and sell them if I do not repay the loan on the day agreed between us. In the meanwhile, until I make default in payment, the books remain in my possession. They are, however, no longer my books. I cannot give them away or sell them; and the person to whom I might pretend to give or sell them would be compelled to give them back to the bill of sale holder.

It can easily be seen how bills of sale lend themselves to fraud and deception. For example, I may be living in a house of £50 a year rental, the house being well furnished. The tradesmen in the neighbourhood, seeing this apparent evidence of my means, give me credit. And all the time every stick of furniture in my house may be under a bill of sale. The consequence of which is that when my grocer's patience becomes exhausted, and he gets tired of "calling next week" for his just debt, and he puts me in the County Court for his account, and eventually sends in the bailiff to levy execution upon my furniture, he finds himself met by the bill of sale holder, who says,



"My friend, you must not touch this furniture. It is mortgaged to me under a bill of sale." And so the confiding grocer would go empty away; unless, perchance, the furniture could be sold for more than would satisfy the bill of sale holder's loan, interest and expenses.

This kind of fraud is still perpetrated; but the Legislature has done its best to remedy the evil by making **all bills of sale public documents**. The way in which this has been done was by means of two Acts, called the Bills of Sale Act, 1878 and 1882, under provisions of which every bill of sale **must be registered** in the Bills of Sale office at the central office of the High Court of Justice. In addition, if the person who has made the bill of sale (borrower) lives out of London, the registrar at the central office sends down to the County Court of the district where the borrower lives an abstract or summary of the bill of sale, and the same thing happens when any of the goods mortgaged are described as being elsewhere than in London.

**Anybody is entitled to inspect the register** of bills of sale, either at the central office at the High Court in London or at the local County Court, on payment of one shilling. An index of names is always kept at every registry; so that if you want to know whether Blank, who is asking you to give him credit, has a bill of sale over his goods, all you have to do is to pay your shilling and fill up a form, which will be supplied to you at the registry, and look for the name of the person in the indexes for the last five years. You need not go beyond that period; because a bill of sale becomes **null and void at the end of five years** unless the registration is renewed. So much for the position of parties other than the borrower and lender. Now, first premising that there are bills of sale which have nothing to do with loans, and with which I consequently shall not deal, let me discuss shortly bills of sale themselves and the position of borrower and lender thereunder.

To begin with, every bill of sale for money lent is void unless it is **made in a particular form**. This is a point to be borne in mind by every lender on this class of security; for this provision of the Bills of Sale Act, 1882, has knocked on the head more bills of sale than you could count in a week. The Act gives a form which is to be followed strictly, and although a few deviations have been allowed to be good, yet so many have been held to be bad, and therefore to render the document worthless as a security, that it is safer—indeed, it is the only safe plan—to stick to the statutory form.

The object of Parliament in compelling all these securities to be in the same form is to protect the borrower and the borrower's other creditors. Bills of sale were, and are even now, a favourite security of the professional money-lender. Such a one feels that he has his debtor very much in his clutches when he holds a bill of sale over his household furniture. If you can threaten to sell a man up and break up his home, it is obvious that you have a very effective method of putting the screw on. And before the law prohibited it, money-lenders used to have bills of sale drawn up with clauses giving them the right to seize and sell the goods on the minutest provocation. It was not at all uncommon for the creditor to have the right to demand the whole of his debt on a few days' notice; and if that notice was

not complied with, to seize and sell the mortgaged goods. Mr. Shylock would use this power to wring more money out of his miserable victim. He would give notice; and when the debtor went round to ask for a respite, he would say, "If you will pay me £5 for my trouble, I will withdraw the notice this time." Probably the £5 would be paid; and the manœuvre would be repeated at intervals.

## FORM OF BILL OF SALE.

THIS INDENTURE made the [first] day of [October] one thousand eight hundred and ninety-seven between [James Smith] of [15, Pilgrim Road, Churchton] in the county of [Worcester] [Carpenter] of the one part and [Claud Montmorency] of [1, Cheese Road, Halfby] in the county of [Salop] financier of the other part WITNESSETH that in consideration of the sum of £— now paid to the said James Smith by the said Claud Montmorency, the receipt whereof the said James Smith doth hereby acknowledge [or whatever else the consideration may be] he the said James Smith doth hereby assign unto the said Claud Montmorency All and singular the several chattels and things specifically described in the schedule hereto annexed by way of security for the payment of the sum of £— and interest thereon at the rate of [sixty] per centum per annum. And the said James Smith doth further agree and declare that he will duly pay to the said Claud Montmorency the principal sum aforesaid together with the interest then due by equal [quarterly] payments of £— on the [usual quarter days in each year, or as the case may be] And the said James Smith doth hereby agree that he will [here insert the provisions for lender's protection, which should be] at all times during the continuance of this security insure and keep the said chattels and things insured against loss or damage by fire in the sum of £— at the least in the — Fire Insurance Office And will pay all rent and rates payable by him in respect of the premises on which the said chattels or any of them now are And also that in any of the events specified as causes of seizure in Section 7 of the Bills of Sale Act (1878) Amendment Act (1882) it shall be lawful for the said Claud Montmorency or his agents to enter into and upon the premises on which the said chattels and things are and to seize or take possession of the said chattels and things and after the expiration of five clear days from the day of seizure or taking possession to remove and sell the same PROVIDED ALWAYS that the said chattels shall not be liable to seizure or to be taken possession of by the said Claud Montmorency for any cause other than those specified in Section 7 of the Bills of Sale Act (1878) Amendment Act (1882) In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first hereinbefore written

Signed and sealed by me the said James

Smith in the presence of me

John Brown,

12, Main Road, Denbigh.

(Schedule.)

} James Smith. (Seal)

I would have you note that the bill of sale must be attested by a witness—"one or more credible witnesses," is what the 1882 Act (Section 10) says. It is only the signature of the granter—that is, the borrower—which requires this attestation, and not the signature of the creditor. The witness must be someone who is not himself a party to the bill of sale; thus, the creditor cannot witness the debtor's signature. After the document has been duly signed, sealed, and delivered, and the witness has signed it, it must be registered.



How, when, and where to register is the question. Well, you first of all make a copy of the bill of sale and the schedule (*see form on p. 917*). Then you procure somebody to make an affidavit, in which he states (a) the date when the bill of sale was given; (b) that it was duly executed by the borrower and duly witnessed by the person whose name appears as witness; (c) the full address and occupation of the debtor who gives the bill of sale and of the attesting witness. The copy of the bill of sale and this affidavit are filed in the Central Office, and summaries sent to County Courts as stated on page 916. The affidavit is sworn before any solicitor who is a Commissioner to administer oaths. His charge will be about 2s. 6d.

It is most important to have the **correct address and description** both of the debtor and the witness. If not, the whole bill of sale falls to the ground. The reason of this strictness, I suppose, is for the protection of the other creditors, who are supposed to be able, by searching the register, to "spot" the man they are looking for. A man's correct address is the address where he is most likely to be found. This may be his business address or his private residence; but not merely a place where a letter will find him. Thus, it would not be enough for me to describe myself as "of the Confederate Club, Pall Mall," though it is true I belong to that club, and a letter addressed there would be more likely to find me than if it were addressed anywhere else. The particularity of the description of the address depends on the size of the place where the address is given. For instance, you know that if Job Tomson lives at Puddlin-in-the-Marsh, a village of 400 inhabitants, the name of the village would be a sufficient address; because if you wanted Job and went to Puddlin-in-the-Marsh, anybody would tell you where Job's house was. In one case a Mr. M—— had given a bill of sale over his furniture to one Briggs, and his address was given as "Hanley, in the county of Stafford." At that time Hanley had about 40,000 inhabitants. M—— proved that he was well known in the town and that hundreds of letters reached him addressed, "M——, Hanley." The address "Hanley" was held sufficient.

But in another case when a man who lived at "37, Malpas Road, Deptford," described his address as "73, Malpas Road, Deptford," it was held that the address was not substantially accurate, and the bill of sale fell through. As Lord Coleridge said, "If an inquirer went to 73, Malpas Road, and asked for 'Mr. ——,' he would find someone else living there."

The same rule applies to the address of the attesting witness. It must be given so accurately that anyone going to the address named would find the man without difficulty. It is good enough for (say) a clerk to give his address at his master's place of business.

The like strictness is observed in the description of the occupation of the debtor and the witness. One bill of sale was disallowed because the witness, a solicitor's clerk, had called himself "Gentleman." A commercial traveller, who called himself a "gentleman," was held to be wrongly described; because it was not his occupation, not the principal business of his life. And it is not enough to describe a man as "a trader," when he is, say, a grocer or a

draper. This "gentleman" description is put in to avoid the effect of the Acts, which were passed as much as anything to enable all the world to know who are the people with bills of sale over their goods.

You see, therefore, that one great disadvantage of bills of sale is their publicity—a disadvantage, that is, to the borrower, but an advantage to the public.

The Act also imperatively requires that the **goods mortgaged shall be specifically described** in a schedule or inventory at the end of the bill of sale. This is another measure for the public protection. Before this legislative provision it occasionally happened that a swindler would give a bill of sale over "all the furniture, goods, and chattels that now are or at any time during the continuance of this security may be upon the premises," or something very nearly as wide as that.

But now, the bill of sale is void and of no effect unless there is an inventory sufficient to distinguish the goods from other goods of the same kind. Thus, it is not enough to say, "household furniture," or "farm stock." In some cases it will do to describe things by numbers, but not when these things are part of a stock-in-trade; because the trader may have other things of the same kind in his place. Thus, if I am a picture dealer, "450 pictures" will not do; but if I am not a dealer, but am giving a bill of sale over my household stuff, I might say "fifteen water-colour drawings," "fourteen engravings," and so on, without more particulars. Again, if a livery-stable keeper says "twenty horses," in describing his stock-in-trade, it is bad; but if I say "two horses," it is good, because they are not stock-in-trade. But if the livery-stable keeper says, "All the stock-in-trade now on my premises—namely, twenty horses, ten dog-carts, and so on," it is enough.

Again, a bill of sale can only, as against creditors, cover goods owned by the borrower at the time of the bill of sale. I mean that if I give you a bill of sale of my furniture (describing it), and of all other furniture hereafter to be acquired by me and brought into the house, and I afterwards buy a piano, you can seize and sell the piano under the bill of sale, and I cannot stop you. But any other creditor of mine, who has an execution against me, can stop you. Thus, if Jones, the grocer, has sued me for a bill of £10 and has put the bailiffs in, the bill of sale holder can say to those bailiffs, "Don't dare to touch the things included in this bill of sale." But as the piano is not specially named in the schedule, the bailiffs can take it. There is one exception, and that is of trade plant, machinery, or fixtures brought on the factory, workshop, farm, etc., in place of scheduled things of the same kind. Thus, I am a farmer, and I give a bill of sale over my cows, horses, and a steam-plough. The steam-plough becomes worn out, and I sell it and buy another. The new one takes the place of the old in the bill of sale. You will have observed that the form of bill of sale compulsory under the Act says that the chattels shall not be seized or taken possession of except for the causes specified in section 7 of the Act. What are the causes of **seizure and sale of the goods**? Well, there are six causes, and six only, allowed by the Act. They are—



(1) When the borrower does not pay principal or interest up to date according to the contract.

(2) When he breaks some covenant or promise in the deed, necessary for maintaining the security. The last part of the sentence is important. This would include the promise by the borrower to insure against fire.

(3) When the borrower goes bankrupt, or has a distraint for rent, rates, or taxes put in for the goods or any of them. For you must remember that a landlord has always the right to distrain for rent, although the furniture seized is included in a bill of sale. This is because his (the landlord's) right arises from the fact that the goods are on the premises in respect of which rent is overdue; and it does not matter whether the goods are the tenant's or not. The same applies to a distress for rates or taxes. The Act, therefore, provides that if the goods or any of them are distrained upon, the bill of sale holder can at once enforce his security against the rest.

(4) If the borrower *fraudulently* removes, or allows to be removed, any of the goods from the premises. "Fraudulently" means, of course, with intent to cheat the lender—a moonlight flitting, or anything of that kind. But if you want to change your dwelling, and send notice to the lender, "I am going to remove the goods to 12, Moss Road," or the like, there is no secrecy, no fraud, and consequently no right on the lender's part to seize the goods.

(5) If the borrower is asked, in writing, to produce to the lender his last receipt for rent, rates, or taxes, and does not produce the receipt, or give a reasonable excuse. There was once a case where the lender went to the borrower a day or two after quarter day, and said, "Show me your receipt for rent." "I have not paid this quarter's," said the borrower. "Why not?" "Because the landlord always comes round and collects it; and he has not been round yet." Upon this the lender promptly seized the goods; but the borrower made him pay for it, because the Court held that he had given a reasonable excuse for non-production of his receipt.

(6) If execution has been levied against the borrower's goods under the judgment of any Court. In such a case the lender ought to step in at once. He has first claim against everything, except rent, rates, and taxes.

**Removal of the goods.**—The creditor, when he has seized the goods, cannot take them away at once—not even if his bill of sale says that he may. He is bound to allow the goods to remain where they are for five clear days—that is, not including either the day of seizure or the day of removal. Thus, if he seizes on Monday, he cannot remove the things until the following Monday, for he need not take them away on Sunday. This is to prevent extortion and wrongful seizure by giving the debtor time to apply to a judge to restrain the creditor from acting wrongfully. Thus, in the case given above (5), the borrower went at once to the High Court, and the judge ordered the creditor not to sell the goods, but to go out of possession. It also gives time for the landlord to distrain for his rent, the tax collector for Queen's taxes, and the rate collector for rates, or for the debtor to find the money and pay the bill of sale off.

At the end of the five days the goods can be sold, either on the

premises or at some public auction room. The sale must be fairly and properly conducted, and no more must be sold than is sufficient to pay whatever is due under the bill of sale, together with the reasonable expenses of seizure, removal, and sale—*e.g.* auctioneer's commission, the payment of a man in possession, and so on. If more than enough is sold, the creditor is liable to pay the debtor the full value of anything unnecessarily disposed of. He must also hand over any surplus to the borrower. Thus, if the debt, interest, and expenses come to £100, and things have been sold for £102, the £2 belongs to the borrower.

Property comprised in a bill of sale given as security for money lent may sometimes be taken from the lender by the trustee in bankruptcy (p. 421), if the goods are "in the order and disposition of the bankrupt in the way of his trade or business." Thus, if I take a bill of sale over the stock-in-trade of a draper, and he goes bankrupt, the trustee in bankruptcy turns me out. But in some trades it is well known that a man's stock is frequently not his own. For instance, it is well known that a hotel-keeper frequently has the furniture and fittings of his hotel on hire. Therefore the furniture and fittings of a hotel are not "in the order and disposition" of the hotel-keeper; and it is safe for me to take a bill of sale over them, though in fact they are not on hire. Again, it is the custom in the piano trade for a retailer to get pianos from the maker on sale or return—*i.e.* he has them on view, and if he sells one to a customer, he at the same time buys it from the maker. Therefore pianos are not "in the order and disposition" of the retailer. The notion is that a creditor is entitled to assume that the stock, etc., of a trader, if on his premises, is his own; unless there is some well-known custom in that particular trade by virtue of which such stock is not likely to be his own. And in such cases anyone ought to inquire as to the ownership of the goods before trusting the trader. Thus, I am not entitled to assume that a hotel-keeper's furniture is his own property, because of the custom above mentioned.

I have already told you that bills of sale are **not known in Scotland**. In that happy country, if you wish to mortgage goods and chattels—*i.e.* movables—you must actually deliver them into the possession of the lender. In other words, you must pawn them. But if a Scotsman who has a residence in London gives (in Scotland) a bill of sale of his London furniture, that is enough to transfer the furniture to the lender; provided the bill of sale is registered in London.

Let me conclude the section by a bit of **practical advice**. If you ever give a bill of sale over your goods, and the lender seizes them when you do not owe anything (*i.e.* when no instalment is due), or when you have not been distrained upon for rent, or, in short, when you have not done or suffered any of the six things mentioned on page 920, if your creditor is a money-lender, do not stop to parley with him. If you do, he will get the better of you, probably. But hie to a solicitor and tell him your case. He will very soon put a stop to your creditor's nefarious practices by an order from the Court. There is nothing your money-lender dislikes more than to



have a lawyer on his track. If he dislikes anyone more than a lawyer, it is a judge. And Mr. Moneylender will have to pay all the costs if he makes a wrongful seizure and so compels you to get legal protection.

## SECTION IV.

### PAWNING.

The antiquity of pawning—What it is—The origin of the three brass balls—How far a licence is necessary to a pawnbroker—How to obtain a licence—Pawning not with a licensed pawnbroker—No right to forfeit the pledge—Licensed pawnbrokers—No need for licence if loans always over £10—Pledges for 10s. and under—Redeemable within a year and seven days—Or else forfeited—Over 10s., no forfeiture—Sale of unredeemed pledges—Borrower entitled to surplus—How to discover what your property was sold for—Loan above 40s.—May be special contract ticket—Interest and other charges—Pledges destroyed or damaged by fire—Pledges allowed to deteriorate—Lost tickets: what to do—The ticket-holder has [a right to the goods—Pawnbrokers Act does not apply to loans of over £10.

PAWNING is about the oldest form of loan on the security of property. It consists of the borrower giving into the lender's possession property which is to be held by the lender until the borrower pays back the loan. You see, it differs from mortgage in this respect: that the pawner bodily hands over the property pledged to the lender; while a mortgagor of land [or of goods by bill of sale] does not necessarily give the possession of the mortgaged property to the creditor, but only gives him a right to come in and take possession in certain circumstances.

The first people in Europe to carry on the business of pawnbrokers were the Italians. The first to introduce the trade into England, whence it spread to Scotland, were certain Lombard goldsmiths, who settled in London and Westminster about the middle of the thirteenth century. As the custom was in those days, these goldsmiths displayed a sign—just as public houses are known by their signs nowadays—and these goldsmiths put up for their trade distinction a representation of the arms of Lombardy—three golden coins called bezants, two above and one below. In course of time the three yellow bezants became so identified with the money-lending trade that all public money-lenders adopted the distinction. Hence the three golden balls displayed to this day by pawnbrokers.

When I say the Lombards were the first pawnbrokers I do not mean that they first invented the kind of security called pawn or pledge. Pawning was known in Italy certainly for 1,200 years before the Lombards began pawnbroking. The modern Italian merely began to lend money on the pledge of personal (movable) property as a special trade.

As many of my readers are aware, I daresay, all pawnbrokers have to be licensed. A pawnbroker's licence costs £7 10s., and has to be obtained every 31st of July from the Inland Revenue Office. But the Revenue Officer will not give the licence unless the broker has obtained a certificate from the magistrates first. This certificate can only be obtained on proof of good

character, and will be refused if the magistrates have reason to believe that the proposed pawnshop is a place frequented by thieves or bad characters. The first time you apply for a certificate you must give twenty-one days' notice thereof to the overseers of the parish and the local police superintendent; and also twenty-eight days before applying you must cause a notice of such intention to be affixed to the door of the parish church. If the parish be churchless, post your notice in some other conspicuous place.

Now, more than once I have been asked this question: "A friend of mine wants to borrow £10 from me, and he offers as security to deposit with me his watch, a diamond ring, and an oil painting. If I lend him the money and take the things as security, shall I be liable for **acting as a pawnbroker without a licence?**" My readers must remember that to deposit a watch, or a piano, or anything else with a friend as security for a loan, is just as much pawning the article as if you had taken it to a shop bearing the arms of Lombardy. The answer to this question is that you are quite safe in lending to your friend on the security of the proposed pledge, and you will incur no legal penalty. For it is only *pawnbrokers* who have to be licensed, and a pawnbroker is one who carries on the business of taking goods and chattels in pawn. One pawn does not make a pawnbroker. He must carry on a business of the kind. That is to say, he must have a shop, warehouse, or other house for the transaction of business where he holds himself out as ready to lend money on the security of goods. It is also pawnbroking to buy goods out and out with a condition that the seller may repurchase them. Again, a pawnbroker need not be licensed unless he pays or advances sums of £10 and under; for the Pawnbrokers Act, 1872, only applies to pawnbrokers who lend such small sums. Thus, many jewellers in London are in the habit of lending money on the security of jewellery, and bankers habitually lend money on the deposit of valuable jewellery and plate. If bankers and jewellers who do this kind of business make it a rule never to lend as little as £10, they need not have a pawnbroker's licence.

When goods are pawned, **not with a licensed pawnbroker**, the terms of the contract are entirely a matter of agreement between the borrower and the lender. Thus, it may be agreed that if the loan is not repaid in a week or a month, the lender shall have the right to sell the pledge and pay himself. The rate of interest also depends upon the agreement of the parties. If no particular rate is mentioned, it is understood to be 5 per cent. It is always the rule in what I may call private pawning, that the lender may sell the property as soon as the loan is overdue. And it is overdue on the day after it ought to have been paid. But until the property pledged has been sold — that is, so long as it remains in the possession of the lender — the borrower has always a right to redeem it by repaying the loan and interest up to date. This right continues for six years; but if the borrower has paid any part of the loan or interest, the six years begin to run from the date of the last payment.

What I mean to make quite clear to you is that property pledged does **not** become the property of the creditor if the loan is not **punctually repaid**.



In fact, even if the borrower has agreed to forfeit his property provided that he does not pay up to time, the agreement is not valid. A Court of Equity will grant relief against a forfeiture. The argument is this:—The property was deposited with the lender primarily to secure that his debt and interest should be paid. If the money is not forthcoming precisely up to time, what is the damage to the lender? Why, this—he is deprived of the use of his money for a longer time. And for this deprivation the proper compensation is to make the borrower pay the interest which the lender would probably have gained by laying out the money afresh. It is complete justice to the lender, then, to give him back his loan with interest up to the day of payment. On the other hand, it would be an injustice if the borrower had to part with his property for less than it was worth. And if the creditor were allowed to keep the pledge, this injustice would almost certainly be worked; because he is not at all likely to have lent upon the goods anything approaching their full value.

**The lender must take care of the pledge—the greatest care.** He must not damage it by his negligence, or suffer it to be damaged. He is not allowed to use it for his own purposes. If I pawn a horse—*i.e.* deposit it with you to secure a loan—you are at liberty to take the horse out for exercise, and, indeed, you ought to do so. But you must not ride him or drive him as you would your own beast. That is to say, you must not work him. If I deposited my signet ring as security for the sovereign I borrowed last week, do not let me catch you wearing it. And if you carelessly leave it about so that it fairly calls out, “Come and steal me,” and some felon accepts the invitation, you will have to pay me the full value of my jewellery, deducting the sovereign lent.

**The licensed pawnbroker** is under somewhat different rules, imposed by the Pawnbrokers Act, 1872, which applies to Great Britain, but not to Ireland. To begin with, he may be fined and lose his certificate from the magistrates if he carries on business or opens his shop on Sundays—or (in England) on Christmas Day, or Good Friday. He must keep his Christian name and surname over his shop door, together with the word “pawnbroker.” He must also keep exhibited in his shop, in such a position that anyone coming to pawn or redeem pledges can read it, certain information—namely, the information that is required by the Act to be on the back of pawn-tickets. This is in order that persons who deal with the pawnbroker may have every chance to know what their rights are on such matters as the interest chargeable, the right to redeem the pledge, and the other requirements of the Pawnbrokers Act. A pawnbroker must also keep and use in his business a set of books—namely, a pledge book and a sale book—and also some forms of declaration to be used by customers who have lost their tickets.

The Pawnbrokers Act does not apply to **loans of more than £10, even by a licensed pawnbroker.** The Act divides pawnbrokers’ loans under three scales. The first, a loan of **ten shillings and under.** As to these, a pawnbroker is not allowed to make terms with his customer in excess of the terms permitted by the Act. He may, of course, charge as much less as he pleases

The rule is that a pledge pawned for ten shillings or less can be redeemed any time within a year and seven days, not including the day when the article was pawned. Thus, if I pawn my waistcoat for five shillings on the 24th of December, 1897, I can take it out up to and including the 31st of December, 1898. If I do not redeem it then, it is forfeited—that is, it becomes the absolute property of the pawnbroker, and he can sell it and make whatever profit he is able.

If the loan is for **more than ten shillings**, the borrower has a year and seven days, as before, within which to redeem. But if he does not redeem within that time, the only thing the pawnbroker can do is to sell the pledge by public auction. He cannot, as when the loan is for ten shillings or less, treat the pledge as his own. In plain English, there is no forfeiture, properly so called, of a pledge pawned for more than ten shillings. If you have pawned your watch for (say) £1, and the year of redemption and seven days of grace have gone by, you can at any time go to the pawnshop and ask to redeem it on payment of loan and interest. If the pawnbroker says, "It has been sold," ask to see the sale book (which every pawnbroker must keep under penalty of a fine), and request the worthy man to show you the entry relating to your property. He is bound to comply. Should it appear that your watch was sold for more than enough to satisfy the debt and interest up to the date of sale, you have a right to the surplus—except that the pawnbroker can deduct the reasonable expenses of the sale. If you have any doubt about the pawnbroker's book-keeping, make him show you the catalogue of the sale. This catalogue has to be filled in by the auctioneer with the price realised for each article, and signed by the auctioneer. Naturally, you cannot wait for half a century and then demand that the pawnbroker shall turn up his books; but you must make your demand to see the entries and to be paid the surplus **within three years** of the date of the auction, and pay one penny to the pawnbroker for his trouble in showing his books.

If you have pawned other goods with the same pawnbroker, and they were sold at the same auction or at another auction within twelve months before or after, and there is a surplus in one case and a deficit in the other, the pawnbroker may set off the surplus against the deficit.

If the loan is **above forty shillings** and not more than £10, it is open to the pawnbroker to make a special contract with the borrower. This special contract is to be contained in a ticket signed by the pawnbroker and delivered to the borrower. A duplicate must be signed by the borrower and retained by the pawnbroker.

**Pawnbroker's interest and charges.**—On loans of 40s. and under the pawnbroker is not allowed to charge more than one halfpenny per month for every two shillings or fraction of two shillings lent. A fractional part of a month is to be counted as a whole month. Thus, you see that if you pledge an article for a small sum, it is always most economical to obtain an even number of shillings on it, and to redeem your goods at the end of a month. For you have to pay as much interest on seven-and-sixpence, or even seven shillings or six-and-sixpence, as on eight shillings. And if you pawn your



watch for a sovereign on the 1st of January, it will cost you as much to redeem it on the 2nd of February as on the 28th. As has been mentioned, the pawnbroker is allowed to make a special contract with the borrower when the loan is over 40s., up to £10. This contract, or special ticket, must state how much the article is pawned for; how long it is pawned for, which must not be less than three months; what rate of interest is to be charged. The rate is left to be agreed upon between the pawnbroker and the borrower, but it must be so much per calendar month—fourteen days or under counting as half a month, and more than fourteen as a full month. The ticket must also state that if the pledge is not redeemed at the proper date the pledge will be sold.

If no special contract is made for a loan of over 40s., the pawnbroker is entitled to charge interest at one halfpenny per month or fraction of a month on every 2s. 6d. lent. This works out a little queerly. As you will see by referring to the last paragraph, on a loan of 40s. the pawnbroker is entitled to 10d. per month interest. On a loan of 50s., unless he has made a special contract, he is also only entitled to 10d.

**For the ticket** the statutory charge is a halfpenny when the loan is 10s. or under, and a penny when the sum lent is over 10s. But for a special contract ticket the pawnbroker may charge whatever the borrower agrees to.

**One more word about special contracts.**—No pawnbroker is entitled to make a special contract to the effect that if the goods are not redeemed they shall become his property. Special contract or not, he can do no more than sell the pledge; and the borrower is entitled to any surplus remaining after paying the loan, interest up to day of sale (which must be by auction), and reasonable expenses of sale. Again I remark that, special contract or not, if the loan is more than 10s. and the property has not been sold by auction, the borrower can redeem it at any time. The only effect of fixing a day for redemption is to fix a day after which the pawnbroker may lawfully sell the pledge by auction. If he sells privately, or before the fixed day, he must pay to the borrower the full value of the pledge—not necessarily what he sold the article for, but the full value, which is quite another thing.

A pawnbroker is responsible for **goods destroyed by fire** or damaged by fire while they are still redeemable. In order that the amount to be paid by the pawnbroker may be readily ascertained without the trouble of a lawsuit, the value of the pledge is to be estimated at the amount of the loan, the interest, and 25 per cent. of the loan. Out of this the pawnbroker retains the loan and interest; and so he really has to pay 25 per cent. of the sum advanced. Thus, if you pawn your Sunday coat for 8s., and it is burnt, the pawnbroker pays you 2s., and you are quit of the loan and interest. The broker may cover his loss by insurance.

He is also liable if he allows the pledge to depreciate in value through his negligence or that of his servants.

**Losing the ticket** is rather a serious matter; for if anyone finds it and hies him to the pawnshop therewith, and the pawnbroker, nothing suspecting, makes over the pledge, you have not only lost your ticket, but your property.

Your best plan, then, is to go straight to the pawnshop, make known your loss, and if no one has presented the ticket in the meantime, ask for a form of declaration. You are entitled to this as of right on paying a penny, or one halfpenny if the loan was 5s. or under. You fill up this form of declaration; go before the nearest magistrate and swear to its truth; take it back to the pawnshop within three days and redeem the pledge. Should someone else turn up with the ticket in the meantime and be unable to give an account of how he came by it, the pawnbroker will give him a chance to explain it to the police.

You may be asked at some time or other by an unprosperous friend to **buy a pawnticket**. Provided the time has not expired and the pledge is worth redeeming, you are quite safe in doing this, unless your friend found or stole the ticket. For a pawnbroker is bound to regard the holder of the ticket as the person entitled to redeem the pledge. In other words, the holder of the ticket is to be considered as the borrower. He is entitled to redeem, to inspect the sale book, to have any surplus paid to him (p. 925), and so on.

In conclusion, I would remind my readers that the statutory liabilities of a pawnbroker only apply when the loan is not more than £10. **When the loan is over £10** the licensed pawnbroker is left to the operation of the ordinary law. He is, in fact, in the same position as a private lender. He is thus not liable for loss or damage by fire unless the fire happened by his or his servants' negligence or wilful act. He is not bound to enter the loan in his pledge book. If he sells the property he need not sell by auction, nor keep an account in his sale book. He is entitled to sell when the loan is overdue, and must account for any surplus. And the borrower is entitled to redeem within six years unless the goods have previously been sold (*see* p. 923). I suppose the Pawnbrokers Act does not apply to loans of over £10 because those who borrow such large sums do not need the same Parliamentary protection as the poor people who pawn goods of small value.

## SECTION V.

### GUARANTEEING A LOAN, OR CAUTIONRY.

Guarantee must be written—Signed by the surety—"Accommodation bills"—Liability of the surety—To pay immediately the debt is overdue—Lender not bound to sue the borrower first—Nor to ask the surety for the money—A clause that ought always to be inserted—Rights of surety—Physical and moral truth—The surety is entitled to know all about the loan—Surety released if creditor does anything to his prejudice—Giving further time to the debtor—Wasting the securities—Guarantor's rights after he has paid—Entitled to all the securities held by the lender—Contribution from co-sureties—A bankrupt or insolvent co-surety—A point to know!—No guarantee is valid unless accepted by the creditor—Must be accepted within a reasonable time—Acceptance must be communicated—Revocation of a guarantee before acceptance.

THERE are few things more unsatisfactory than guaranteeing a loan. Innumerable are the cases of men who have bitterly rued the day when they lent their names to a friend, or became surety or caution that a loan should



be repaid. It is, I know, very hard to refuse, when you are asked to become surety for an intimate friend; but my advice is never to enter into the obligation unless you are practically prepared to lend the money yourself.

As to the form of a guarantee, I have already said on page 345 that by the law of the United Kingdom, as settled by the Mercantile Law Amendment Act, 1856, every guarantee [called "cautionry" in Scotland] must be **in writing, signed by the guarantor.**

As to the substance of a guarantee, it is this: "If Jones does not repay the loan, I will."

Besides a formal guarantee, like the above, you can become surety or cautioner for a borrower by putting your name to a bill of exchange or promissory note, upon the strength of which your friend gets someone to give him cash for the security. This is one of the most dangerous forms of guarantee; for your friend having negotiated the piece of paper, it is absolutely binding upon everybody whose name is on it.

Suppose Jones asks me to "accept" a bill drawn by him, he giving me no value or consideration for my acceptance, and I do "accept" the bill (*see pp. 456-7*), it is called an **"accommodation bill."** This name is applied because I accept the bill not for anything that I am to get out of it, nor because I am in any way bound to do so, but simply to accommodate Jones. Now as between Jones and myself I am not bound to pay the amount. The only person whom I am bound to pay is a "holder for value." Suppose, for instance, that Jones gives the bill away to Smith, I am not bound to pay Smith. But suppose Smith sells it to Brown, though he only sells it for half-a-crown, I am bound to pay Brown. And if Brown makes a gift of it to Robinson, I must pay Robinson; because though that gentleman gave nothing for it, he received from someone who did. If anybody asks you to put your name to an accommodation bill, think of *Punch's* advice to those about to marry—"Don't."

Now I wish to discuss the **rights and liabilities of a guarantor [cautioner]**. And first as to his liabilities, to illustrate which I take a simple case. Brown borrows £50 for a year from Jones, repayable with 5 per cent. interest on the 1st of May, 1898, and you guarantee the debt. The 1st of May arrives, but Brown does not pay. What is your liability? Well, you must pay. "I know that," you say; "but ought not Jones to have a go at Brown first—to put him in the Court, and do all he can to get the money before he asks me for it?" Certainly not. Probably the very reason why Jones would not trust Brown without having your guarantee was because he knew Brown to be a slippery customer, who would put him to the trouble of raising an action for the debt; and so he refused to lend without the extra security of somebody whom he knew to be well able to pay, and not slippery.

Again, **no creditor is bound to ask the surety for the money.** It is the duty of the surety to go to the creditor and offer to pay as soon as the debt is due. "But how am I to know whether Brown has paid or not?" you inquire. My dear sir, go and ask Brown. Or go and ask Jones whether Brown has paid him. Nothing is more easy.

When is the surety bound to pay? At what date? Well, just look at the contract. You agreed with Jones, "If Brown does not pay you, I will." Now, Brown ought to have repaid the loan and interest, according to his contract, on the 1st of May. He did not pay. Your liability, according to your guarantee, was to begin as soon as he failed to perform his promise. And that is on the 2nd of May; because Brown had the whole of the 1st of May in which to fulfil his contract. So that a surety is liable to have an action brought against him, without any notice, the day after the principal debt becomes due. To which there hangs **an obvious moral**. If you do give a guarantee for a loan, always insist that the document shall contain a clause to this effect:—"The surety [cautioner] shall not become liable upon this guarantee [cautionry] until [*four*] days after he shall have received from the creditor written notice that the debtor has made default. Such notice may be sent by registered post to the surety at the address [*14, High Street, London, W.*], and shall be deemed to have been received by him at the time when it would have been received at such address in ordinary course of post."

Having discussed a guarantor's liabilities, let us now consider what his rights are. In the first place, when the guarantee is given he is entitled to rather better treatment than the average party to a contract. As a rule, it is "Every man for himself, and the devil take the hindmost" when you make a bargain. So long as the other man does not actually tell you a lie, or say something that is not true, you cannot expect any more. You are entitled to "physical truth," as some philosophers call it—not merely to moral truth. If I say, "It is ten miles from here to Hatfield," and it is ten miles, that is physical truth. If I believe it to be ten miles, that is moral truth; though, in fact, the distance may be more or less than ten. Miles are always measured morally by the Cornish peasantry. Now when I am about to give a guarantee, I am entitled to something more even than physical truth from the creditor. I am entitled to have from him a **full disclosure** of anything that he knows which would affect my guarantee—that is to say, any fact which increases my risk. I don't mean to say that the creditor must tell me everything known to him which might influence my discretion. For instance, if I am about to guarantee a loan for a man whose means consist of royalties from a patent sheep-shearer, the creditor need not tell me that he knows of a new machine that is likely to supersede the old one, and so impoverish the borrower. But he is bound to tell me every circumstance of the arrangement between himself and the borrower. For instance, if the loan is only a new advance to enable the borrower to repay money he already owes to the same creditor, I ought to be told; because I might think that the loan was one of money for the debtor to use for the purposes of his business. It is one thing to guarantee a loan when your friend is to put the money in his pocket, and quite another when really the lender is to have all the advantage. In the latter case, you are simply guaranteeing the old debt.

The surety has also a right that the lender shall do nothing to prejudice him. By this I mean prejudice him in his rights to recover from someone else the whole or part of the money paid under the guarantee. The



lender may do this in several ways ; for instance, by **agreeing to give time to the debtor**. Why is this ? It is because the guarantor, if he has to pay on his guarantee, can take action against the debtor for whom he was bound, and try to get the money from him. Now, if the creditor makes a binding agreement by which payment is postponed, the right of the guarantor will also be postponed, and he may not be able to get his money so well at the later date. Hence he is prejudiced by the giving of time to the debtor.

I once had the pleasure of bowling over a money-lender on this point. He had lent £50 to Smith, and had taken a bill for £80 due in three months. Jones had guaranteed the bill. At the end of the three months, Smith could not pay, so he went to the money-lender and asked for time, which the money-lender consented to give upon his paying £10 down and giving a new bill for £110 due in three months. Again Smith was unable to pay, so the money-lender called on Jones under his guarantee. Jones was also unable to pay, and asked for time ; but the money-lender refused to grant it, and took legal action. Jones's lawyer, however, on going into the matter, discovered that the original bill had been renewed ; so Jones fought the action, and won it on the ground that the creditor had given time to the debtor, and so destroyed the guarantee.

I would have you observe, however, that if when he agrees to give time to the debtor, the lender expressly reserves his right against the guarantor, the latter is not released. I would also have you observe that the surety is not released unless the promise to give time to the debtor is a promise legally binding. That is to say, if the lender says to the borrower, "I will give you another month to pay in," this does not release the guarantor, because it is not a binding promise. But if the lender says, "If you will pay me an extra ten shillings, I will extend the time for a month," and the borrower agrees to this, the surety is released, because the promise to give time is a binding contract.

In like manner, if the creditor has taken **other securities** for the loan, and he gives any of them up, or allows them to become worthless, the surety is released. This is because when you give a guarantee you are entitled to the benefit of all the securities held by the creditor.

**When the guarantor has to pay**, he becomes entitled to several rights. In the first place, as indicated in the last paragraph, the creditor may have other securities for the loan. Thus, it is not an uncommon occurrence for a borrower to give a bill of sale over his furniture, and also to procure a guarantee from a friend. On the borrower failing to pay his debt, the lender may, if the friend is a substantial man, prefer to make him pay rather than sell the furniture under the bill of sale. Now the friend has an absolute right, in these circumstances, to have the bill of sale transferred to him. If, therefore, the lender has allowed the bill of sale to become invalid (as by not re-registering it within five years), the friend is released.

Another common instance is this: Jones borrows money from a bank, and deposits as security the title-deeds of his house. The bank also gets a

guarantee from Smith. If Smith has to pay the bank, the bank must hand over the title-deeds to him.

It does not make any difference whether the surety knew of the extra security or not at the time when he gave his guarantee. Thus, if Smith did not know when he guaranteed the loan that the bank held the title-deeds, he is entitled to have them all the same.

**Co-sureties.**—The prudent lender will always prefer to have more sureties than one. Suppose Brown borrows £100 from Smith, and Jones and Robinson guarantee repayment; if Brown does not pay promptly Smith can demand the whole £100 either from Jones or Robinson. Take it that he demands the whole sum from Jones, who grins painfully but pays, as he is bound to do. Then Jones can demand what is called "contribution" from Robinson, his co-surety. And it will not make any difference how Robinson happens to be a co-surety. He and Jones may have signed the same guarantee; or they may have given separate guarantees. It matters not, so long as they have guaranteed the same debt. And, of course, if Jones, when he paid the £100 took over from Smith any other securities, Robinson is entitled to participate equally in the benefit of the securities.

When there are several sureties, and one of them is insolvent or bankrupt, and is therefore unable to pay, what is to happen? Thus, Brown, Jones, and Robinson are co-sureties for a debt of £300. The lender comes upon Brown and makes him pay the whole of it. Brown has a right to ask Jones and Robinson for £100 each. But suppose Robinson has gone bankrupt for nothing in the pound, is Brown only to get £100 from Jones? Certainly not; for that would be to make Brown bear a heavier burden than Jones, which would not be equitable. Equality, as a well-worn maxim puts it, is equity. Brown will therefore be able to demand £150 from Jones—the same amount that he himself has to bear.

I suppose my readers have gathered from what is written above that if a surety is called upon to pay, he at once has the right to go for the principal debtor; that is, the man for whom he became surety.

**A point to know.**—In the course of many years' experience in the practice of the law, I have noticed one thing about guarantees of which people are strangely ignorant. I have told you in the chapter on contracts (p. 246) that every contract requires the assent of both parties; or, in other words, an offer on the one side and an acceptance on the other. I have also told you that an offer must be accepted by words, writing, or conduct; but that mere silence does not give consent (p. 251).

Now, guarantee is a contract; and therefore requires an offer and an acceptance; which acceptance must be communicated to the offerer. Scores of times Jones goes to his friend Smith and says, "I am arranging a loan from Shylock; and he wants the names of two sureties. Will you be one?" Smith consents to be one—probably he is a good-natured sort of fool, or Jones would not have asked him—and he writes some such letter as this:—



"To Mr. M. Shylock.

June 5th, 1899.

"SIR,—I hereby agree to become surety for a loan of £1,000 to be advanced by you to Mr. Algernon Jones.

"Yours truly,

"THOMAS SMITH."

Jones seeks out another soft-hearted friend, and obtains a similar letter from him. Then he takes the two epistles to Shylock, who, thinking the two names a sufficient security, lends the money, puts the letters in his drawer, and carefully locks them up. But when Jones does not repay the loan, and Shylock requires the two sureties to make it good, he will find that he has no legal remedy against them. Why not? Well, because he did not think it necessary to call on those gentlemen, or drop them a line accepting their guarantee. This is not generally known. Most people whom I have come across are under the erroneous impression that if you once put your name to a guarantee you are bound by it. I have shown my readers that this is not so, but that an offer of **guarantee must be accepted by the creditor** to be of any value.

From this it follows that such an offer, like any other offer to enter into a contract, **may be revoked** at any time before the lender accepts it. It also follows that unless the lender signifies his acceptance within a reasonable time the guarantee falls through entirely. Thus, in the case given above, if after Mr. Jones has gone, Mr. Thomas Smith thinks he has acted foolishly in offering to become surety for £1,000, he can telegraph or write to Shylock saying that he cancels his guarantee; and if the cancelling letter or telegram arrives before Shylock has posted a letter of acceptance, the revocation holds good. Again, if Mr. Shylock does not communicate his acceptance of Mr. Smith's offer within (say) a fortnight, Smith can make his mind easy.

## Book V.

### INHERITANCES AND TRUSTS.

#### CHAPTER I.

##### WILLS.

MAKING A WILL—How to make a will—IN ENGLAND—Avoid technical words—Essentials of a will—In writing—Signed at foot or end—Not necessarily by testator—Presence of two witnesses—Who may be witnesses—Witnesses must sign in each other's presence—Sanity of testator—Undue influence—The housekeeper—Forms of will to suit various cases—Legacies and devises—Form of will with legacies—A sound will for a family man who trusts his wife—How to prevent an inheritance from being squandered—Charitable gifts—Whom not to make your executor—IN SCOTLAND—Holographs—Wills with witnesses—Form of Scottish will—Aliment to the wife—"Allenary"—Mutual wills—CANCELLING A WILL—A later will does not necessarily revoke a former one—Destruction of a will cancels it—If done by authority of testator—And with intent to revoke—Scoring out words and sentences—Difference between English and Scottish law—Alterations—Wills destroyed—If destroyed by accident or lost may still take effect.

##### MAKING A WILL.

EVERYBODY ought to make a will, whether he thinks he has anything to leave or not; for it is impossible for anyone actually to know that he has no property upon which a will would take effect. He may, unknown to himself, be entitled to property, or become entitled to property before he dies. The very safest thing that any married man can do is to have a will prepared, and execute it **directly after he is married**; for, as I have told you in *The Law of the Family Man* (Bk. I., Chap. I.), a man's will is revoked by marriage. I once knew a man who was about to be married. He was a man of moderate fortune who married rather late in life; and his relatives were not at all pleased at his marriage—though what business it was of theirs, I do not know. A few days before the wedding the bridegroom consulted his lawyer, saying: "I shall want to alter my will. I wish my future wife to have all my property, except a legacy of £100 each to my brothers and sisters." The man of law explained that it was of no use to sign the will before the marriage ceremony, for the ceremony would cancel it. "Very well," replied the client, "we shall be going to Italy for our honeymoon. You prepare a will to carry out my wishes, and I will sign it when I come back." "Better sign it before you go away," was the advice of the lawyer; "then you won't have to do it when you come back." Like a sensible man the benedict acted on the good advice, and a will was prepared at once. On the day of the wedding, just



before setting out on his bridal tour, the newly-made husband stepped into a room and signed the will, and a few minutes afterwards was *en route* for Italy. He never returned, and the poor young widow had cause to bless the lawyer's prudence. For though on the whole of her husband's estate she could live in a certain style of luxury, the portion she would have had if no will had been made would hardly have kept her in comfort.

A man who is not married also does well to make a will, because he (unless he is illegitimate) is bound to have relations of some sort, who will, as likely as not, squabble over his property after his death unless that property is disposed of by will. There is no such danger in the case of an unmarried man who is illegitimate, for he has no relations. He is, in the ancient phrase, *filius nullius*—nobody's child; and legally is no relation to his own mother. But such a person will probably have somebody or some charitable or useful object that he would like to benefit, and unless he makes a will, all his property will go to the Crown. So that a person with relatives does well to make a will, to prevent family quarrels; and a person without relatives does well to make a will, unless he wishes his property to fall into the hands of the State.

In England, as I have already stated (p. 54), a man can make whatever sort of will he likes. His family and his wife have no right to a penny of his money or a foot of his land. In Scotland, however, a man with a wife must leave her at least one-third of his movables; if he has children, he must leave them one-third amongst them. Only the remaining third can be dealt with by him just as he pleases (*see pp. 54 et seqq.*). These thirds are called the "wife's part," the "bairn's part," and the "dead's part." A Scotsman can, however, deal with his immovable (or heritable) property as he pleases—*i.e.* land and things in and upon it.

**How to make a will** is an important subject for consideration to the average man, and it is for him I write. For the sake of convenience I will deal with the English and the Scottish fashions separately, though there is not a very great amount of difference between them.

An **English will** does not require any particular niceties of language. It is, of course, except in the very simplest of cases, advisable to call in the aid of a lawyer, for he is used to the business, and will express your meaning better than you will express it yourself. It is, indeed, the height of folly to make a will that contains anything like complicated provisions without legal assistance. I allude to cases where the property is given to a number of people, to some of them on different conditions from the others, and especially where the property is landed property. I call a will a simple will when (say) the father of a family leaves all his property to his widow, to be enjoyed by her for her life, and after her death to be divided equally amongst his children.

**Clergymen and ministers** of other denominations are very often placed in a position when it would be of the greatest possible advantage to the persons whom they are called to minister to, if they knew how to make a will. I may be permitted to advise gentlemen of the sacred calling to carry with them a copy of the attesting clause given on p. 940; and to carry in

their heads the directions I am now about to give. In the first place, let the layman who draws up a will strenuously avoid the use of technical, "lawyery" words and phrases. You may be called upon in an emergency to do this bit of lawyer's work, but do not try to do it as a lawyer would. By technical expressions, I mean such words as "heirs," "next-of-kin," and other words of that kind which are well known to occur in legal documents, but the use of which is only adequately understood by trained lawyers. For a clergyman or a village schoolmaster making a will in an emergency to attempt to use the style and phraseology of a lawyer, is as foolish as it would be for the same clergyman or schoolmaster to attempt a difficult and delicate surgical operation upon an injured man. He is, of course, bound to do his best in both cases; and just as it will be best and wisest in the one case to confine his exertions to stopping the flow of blood, cleansing the wound, and bandaging the injured limb, so in the other case he will act most judiciously if he writes no word of which he does not understand the full purport.

To take an example or two:—Jones being ill and *in extremis*, there being no lawyer handy, asked a friend to draw up a will. Jones knew that if he had died intestate his widow would have taken half his property, and his brothers and sisters the other half; and he told the friend that he only wanted to make a will so as to appoint Smith his executor. "For," said Jones, "I want my money to go just as it would have gone if I had made no will. That is, I wish my wife to have half, and my brothers and sisters the other half amongst them." I ought, perhaps, to have said that Jones had no children. Now, Jones's friend ought to have been able to follow these directions. What he did, however, was this:—He wrote, and Jones signed, "I give, devise and bequeath all my property to my next-of-kin. And I appoint Thomas Smith my executor." Result: Mrs. Jones, the widow, got nothing at all. Had the friend written, "I give half my property to my wife, and the other half to my brothers and sisters," this would have carried out poor Jones's wishes. But no! The friend had an idea that the will would be more stylish if he drew it in what he was pleased to think was legal language.

Again, when Tomkins asked the parish clerk to draw a will for him, he had great confidence in that worthy's learning. Dr. Samuel Johnson used to say that every parish clerk ought to have knowledge enough to draw a simple will. To the parish clerk Tomkins said, "I wish to leave my bit of freehold land to my brother William, and after his death I want it to go to his sons." Had the clerk written this down, all would have been well. But he, too, was desirous of showing his knowledge of lawyer's style, and so he wrote, "I devise my freehold farm to my brother, William Tomkins, and after his death to his male heirs." Result: William's children never got anything; for the gift created a male entail in William. William "barred" the entail, and so made the land his absolute property, and his sons had not the least claim on it.

It would not be difficult to fill a book half the size of the present work with instances of the blunders—innocent blunders, all of them—committed by unskilful people in the making of wills. And in half the cases the mistakes



have arisen simply by reason of laymen attempting to write the language of lawyers. The other half of the blunders have been perpetrated because of people undertaking a task that is too big for them. For it is a task too great for anyone who has not had a legal training to draw a will of a complicated character.

My advice, therefore, to ministers of religion, schoolmasters, and other such people who may be called upon in an emergency to draw up a will, consists of **two "Don'ts"**—Don't use words not in your ordinary vocabulary. Don't attempt to make a complicated will. The positive part of this negative advice is, Write the will just as you would write a letter to a friend. And decline to make a will for anybody who insists on putting in a lot of conditions, making provision for a number of contingencies, and so on. Tell such a person that his will is a matter for a lawyer; that you are willing to make an ordinary family will, but that your skill does not run to the drawing up of a complex document. Such a course is not only the most honest but also the most kind.

After this general advice, let us condescend to particulars. There are only a few **essentials of an English will**. (1) It must be in writing. (2) It must be signed by the testator, or by someone on his behalf, at the foot or end of the will. (3) The signature must be either actually made in the presence of two witnesses, or else acknowledged by the testator as his in the presence of two witnesses. (4) These two witnesses must themselves sign as witnesses in the presence of the testator. (5) The testator must be of full age, of sound disposing mind, and not subject to any undue influence, physical compulsion, or anything else which would interfere with his free and uncontrolled disposition of his property. I will consider these points in order.

(1) **The will must be in writing.** I think I hear somebody say, "You need hardly trouble to write a book to tell us that, Mr. Family Lawyer. We know it already." 'Tis well, most sapient reader! But perhaps you do not know that in many other countries it is possible to make a will by word of mouth; and that even in England it is only by a Statute of 1837 (The Wills Act) that writing was made necessary for all wills. Before that date, anyone could dispose of his personal estate by word of mouth. A written will was only necessary to dispose of landed estate. Even now there are **exceptions** to the rule, for soldiers and sailors in the Navy on active service are allowed to make wills by word of mouth or in any other way they please.

(2) The Wills Act also requires that the will shall be **signed at the foot or end thereof**. It is a popular error to suppose that the testator himself must sign or make his mark. And the error is one that has been a fruitful source of dispute. We will suppose a village clergyman called in to the bedside of a man on the point of death. He is just able to say that he has not made a will, and as there is no lawyer in the village it becomes the clergyman's duty to help the dying man to set his affairs in order. "I wish my wife to have the furniture and all my property for life, except my business; and that I want to leave to my two sons. My daughters can live with their mother until they marry; and after my wife's death I should like the girls

This is my last will by which I revoke  
all others and appoint my brother  
Thomas and my friend Frederick Harrison  
of Hope Villa Highgate my executors  
I give £30 to my wife to be paid down  
at once Also £30 to each of my children  
All the rest of my property I give to  
my wife and in case the whole  
property after paying debts should not  
amount to more than £500 then I  
will that she shall have it all and  
that my children shall have no  
legacies

Signed by William Richards  
in our presence.

William Richards  
Tretton Avenue.

Walter Irons

Highgate N.

Rachel Jones July 31. 1899.



ENGLISHMAN'S SIMPLE WILL

(As drawn by a Lawyer).

THIS IS THE LAST WILL of me William Richards of Ireton Avenue Highgate in the County of Middlesex schoolmaster WHEREBY I revoke all my former testamentary dispositions and appoint my brother Thomas Richards of 2 Upper Street Hornsey and Frederick Harrison of Hope Villa Highgate aforesaid my executors I BEQUEATH to my wife the sum of thirty pounds to be paid to her immediately after my death I give to each of my children the sum of thirty pounds AND I give devise and bequeath all the residue of my estate to my said wife PROVIDED ALWAYS that it is my will and intention that my said wife shall have not less than the sum of five hundred pounds And I declare that if the residue of my estate shall not amount to that sum then the aforementioned legacies to my children shall abate so as to leave the said sum of five hundred pounds to my said wife In witness whereof I have hereunto set my hand this 31st day of July 1899

SIGNED by the said testator and acknowledged as and for his last Will in the presence of us who present at the same time in his presence at his request and in the presence of one another have hereunto set our names as witnesses

WILLIAM RICHARDS.

WALTER IRONS

37 Ivyleaf Lane Hampstead  
Merchant's clerk

RACHEL JONES

Servant to William Richards

to have all the property, except the business, equally amongst them." The clergyman duly writes this down. He and the doctor are ready to officiate as witnesses, and then a new difficulty arises. The testator is unable to hold a pen, or even to lift his hand. He may even be paralysed. What is to be done? Now I have known of cases in which nothing has been done, because the clergyman has thought that a will is of no use unless signed by the testator himself. As I have said, this is a mistake. The clergyman or doctor should sign the testator's name for him, first asking his sanction to do so. Then the testator should have the will read over to him, and should be asked, "Do you acknowledge this to be your will?" And if he assents, the two witnesses should be asked to sign. For it is enough if the will is acknowledged by the testator to be his. Indeed, it is a universal rule that if I, in a man's presence, sign a document with his name, at his request, or with his sanction, the signature is his. And this applies not only to wills but to every other kind of document whatever.

*"At the foot or end thereof,"* says the Statute. The signature should always be put as near to the body of the will as possible, so as to avoid any chance of fraud or suggestion of fraudulent interpolation; for it is obvious that if you leave a space between the last words of the will and the signature, it is possible for someone to fill that space in. It is not necessary for the testator to sign every page of the will, though it will be better, if the document be written on two or more sheets, for each sheet to be signed. But this, though a wise precaution, is not necessary to the validity of the will.

It is not necessary to affix a seal to a will as it is to a deed.

(3) It is essential—and here is a thing that my readers should particularly notice—that the will should be signed or acknowledged in **the presence of two witnesses**. The testator need not sign in the presence of the witnesses, though I always think it wiser that he should do so, for then the witnesses can say, "We saw him sign." But what is absolutely necessary is that in the presence of two witnesses the testator should acknowledge the will to be his act. If the testator is ill in bed, the thing is either to read the will to him or else to allow him to read it, and then put the will in his hand, call in two witnesses, and say to the sick man, "Is that your will? Do you acknowledge this to be your signature?" He assents. You then take the document out of his hand, and the witnesses affix their names.

It is just as well to know **who can be witnesses** to a will. The answer is, "Anybody." By this, I mean that a will is always valid if it is attested by two witnesses who were sane at the time. All the same, it is advisable to be careful in choosing your witnesses. If a will is witnessed by any person who takes a benefit under the will, or by the husband or wife of that person, the gift to the witness (or the wife or husband of the witness) is absolutely null and void. More than one little catastrophe has happened through ignorance of this rule. For example, I knew a case in which an old man had drawn up a simple will himself, without legal assistance. It was very much in these words: "I give all my property to and amongst my three daughters in equal shares"; and then he said to his son-in-law, Jones, "I want you and



John the footman to witness my signature." The son-in-law and John the footman witnessed the old gentleman's signature. When the testator died and the will was taken to a solicitor to be "proved" at Somerset House, "How is this?" he said. "I am sorry to say that the legacy to Mrs. Jones is not valid, because her husband was one of the witnesses." The result was that Mrs. Jones's share had to be divided just as though her father had made no will. That is to say, Mrs. Jones, as one of the three next-of-kin, had one-third of it, or one-ninth of her father's whole property. A person who is named in the will as trustee or executor can be a witness, provided that he is not also to take some benefit under the will. But it is never advisable to have a trustee or executor as one of the witnesses. Should any dispute arise about the way in which the will was executed, the fact that the executor was also a witness would be regarded by the Court with a certain amount of suspicion.

(4) Not only must both witnesses be present when the testator signs or acknowledges the will, but they must **sign as witnesses in the testator's presence**. This is another rock on which home-made wills often split. Thus, I was once asked to be a witness to a will of a friend. The document had been already drawn up by a lawyer; and my friend, in the presence of myself and a maidservant, affixed his autograph. Then he walked into the next room; but I called him back and told him that not only must he execute the will in our presence but we must execute it in his.

It is also advisable (though not strictly necessary) for each witness to write his address and trade or calling, so that he may be more easily traced if he is wanted to give evidence.

(5) The **testator must be of sound mind**. Soundness of mind is absolutely essential to every legal act; so much so, indeed, that a marriage is no marriage at all if one of the parties was insane at the time. A man who is subject to fits of insanity can make a will in a lucid interval; it is sufficient for the purpose if the testator had mental capacity enough to understand in what way he is disposing of his property. If he is of feeble mind, or has been wandering owing to his illness, it is best to ask the doctor whether he thinks the patient sufficiently well at the time to understand what he is doing.

Moreover, the testator must not be subjected to any **undue influence** to cause him to make his will in this way or that. Undue influence is a very curious thing. It arises when there exists between two people such a relationship that one of them leans upon the other, and that other has influence by virtue of his position. Such is the influence of a solicitor over his client, a guardian over his ward, a priest or minister over the person whose spiritual guide he is. Then there are cases in which, though no confidential relationship exists, one person of strong mind and determined purpose does, in fact, possess the power of swaying the mind of another. We see this exemplified frequently in the relations that exist between an old *roué* and a young rake. Again we see it exemplified in the case of an aged man and his housekeeper. I suppose most people know old bachelors and widowers, not actually of

unsound mind, perfectly able to understand anything, but with a will enfeebled by age, and completely under the thumb of some servant who has a quiet mental domination, partly by cajolery and partly by bullying. Many a housekeeper makes herself so necessary to the comfort of an old man that she can persuade him to do anything by the mere threat of leaving him. Other unscrupulous women there be who adopt even bolder measures to attain and retain their domination. "He dare not call his soul his own," is the common and expressive way of describing the man under this species of influence.

It is a rule of law that when one possesses the kind of influence I have described, he must not use it to his own undue advantage. He is, as it were, a trustee of the influence, and must not take advantage of it himself. If he uses it, for instance, so as to induce or compel the patient to make a will in his favour, that will is void, because the testator is considered to have been fettered in his mind. If ever you should be asked to make a will for a man of advanced years, or even to be a witness, when all or the bulk, or even a considerable share, of his property is being left to his housekeeper (assuming that he has relatives), you should see that the aforesaid housekeeper is not in the room at the time. Try to get rid of the obnoxious influence for a moment while you explain to the testator what he is doing. Point out that he is disinheriting his relatives, and so on, and endeavour to find out whether the will is really and in substance dictated by the housekeeper. In the same way, always be suspicious when you find an old lady in the act of willing most of her property to her favourite clergyman, or for the benefit of a religious body. And be doubly suspicious if the clergyman or priest is in the room or even in the house at the time the will is made.

Let me say this, in conclusion, that if you happen to be one of the relatives of a testator, and think you have been unjustly disinherited in favour of some person who has used undue influence to have the will made in his (or her) favour, you should be very careful of your facts before disputing the validity of the will. For to charge anyone with undue influence is to charge him with fraud, and the law requires that charges of fraud shall be completely proved—proved "up to the hilt" is the phrase generally used. It is, however, much more easy to prove undue influence when between the testator and the person against whom you charge undue influence there existed a well-defined relationship of confidence such as would naturally give the one a great influence over the other. For instance, when a nun, after entering a convent, has made a will in favour of the mother superior, the Court will easily be led to think that the document was executed by the influence of the superior, and will call upon that lady to prove that she did not, in fact, use any influence to bring about the event that happened. So also if a ward, immediately he (or she) comes of age, executes a will in favour of a guardian; and most of all, if a client makes a will in favour of his (or her) solicitor.

The following is a **form of will** where the testator is a married man with wife and children. He intends to give his furniture and half his other property to his wife, and the other half to his children. As it may be necessary to sell some of the property and divide the proceeds, it is better to appoint executors



and trustees to do this. Two trustees are better than one, because safer. Quite apart from the question of honesty—one may die and leave a vacancy, which will cost money to fill up. Do not appoint more than two, because it is cumbersome and more expensive; and always appoint people who live on the spot where your property is.

### I. Form.

THIS IS THE LAST WILL of me, Samuel James Thompson, of 14, Grapnel Street, Manchester, draper. I revoke all former wills or codicils made by me. I appoint Thomas Smith, of 12, Grapnel Street, Manchester, grocer, and William Green, of 15, Cross Road, Manchester, cotton-spinner, my executors and trustees. I give to my wife, Ann Eliza, the whole of my household furniture, plate, linen, books, pictures, and ornaments in my house, Number 14, Grapnel Street, Manchester, or whatever may be my usual place of residence at my death. I give all the rest of my property to my trustees absolutely, UPON TRUST, to convert the same into money, and to pay and divide the same equally as follows—namely, one-half thereof to my said wife, and the other half thereof to and amongst my children living at my death. And I will and direct that if any one or more of my children shall die before me, leaving issue, then the share of any such child or children shall go as if he or she or they had died immediately after me, leaving no will. *In witness* whereof I have hereunto set my hand this twentieth day of July, one thousand eight hundred and ninety-seven.

Signed by the testator and declared  
by him to be his last will in the presence  
of us, Abraham Brown and Isaac Moss,  
who in his presence and in the presence  
of each other have hereunto set our  
hands as witnesses.

SAMUEL J. THOMPSON.

ABRAHAM BROWN,  
12, High Street, Manchester, draper's assistant.  
ISAAC MOSS,  
9, Old Bailey, Manchester, jeweller.

Now I will give you **another form**, where the testator desires to leave all his property to his wife for her life, and after her death to his children. In this case, unless the whole of the property is freehold land, there **must be trustees**, to whom the property is given to hold on trust. If not, all the personal property (*i.e.* property not landed estate) will go absolutely to the first taker—that is, to the wife. At least, there is a great danger of this. The following is what I recommend as safe.

### II. Form.

THIS IS THE LAST WILL of me, Samuel James Thompson, of 14, Grapnel Street, Manchester, draper. I revoke all former wills or codicils made by me. I appoint Thomas Smith, of 12, Grapnel Street, Manchester, grocer, and William Green, of 15, Cross Road, Manchester, cotton-spinner, my executors and trustees. I give the whole of my property of every kind to my trustees absolutely, UPON TRUST, to permit my wife the use of all my household furniture, plate, and effects during her lifetime. And as to the rest of my property, to pay the rents, profits, and income thereof to my wife during her lifetime on the usual quarter days. And after the death of my wife to sell and realise the whole of my property and effects, and pay and divide the proceeds to and amongst my children living at the death of my wife. And I will and direct that if any child or children of mine shall die

before the death of my wife, leaving issue, the share of such child or children shall go and be paid as though he, she, or they had survived my wife and died intestate. In witness whereof I have hereunto set my hand the second day of August, one thousand eight hundred and ninety-seven.

Signed by the said testator and  
declared, etc. [as in Form I.]

SAMUEL J. THOMPSON.

[Witnesses, as in Form I.]

It very often happens that the most valuable part of the property of a testator of the middle class consists of a business—a shop, a farm, a market garden, or the like. Now the **will of a business** is a delicate matter, and I strongly advise such a will to be drawn by a solicitor. A word of advice: When you go to a lawyer to consult him about your will, never fail to tell him if you wish your business to be carried on for the benefit of your wife and family after your death. Executors and trustees have not the power to carry on a business unless the will expressly authorises them to do so. Now, most shopkeepers, market-gardeners, and other tradesmen have a son competent to carry on the business. He probably has been in it ever since he left school. Or perhaps the wife has assisted in the concern, and is able to manage it herself. I give below a form of will of a man who wishes to leave all his property to his wife for her life, including the benefit of his business. And as he does not wish the business to be sold when his widow dies, and it would not be convenient to leave such a business to all his children; and as, again, he does not wish to favour one child above the others, he gives to one of them the option or right of buying the business.

### III. Form.

THIS IS THE LAST WILL of me, Jasper Greenjones, of 17, Baxter Avenue, Swindon, Wiltshire, grocer. I revoke all former wills or codicils made by me. I appoint Thomas Brown-Smith and Edmund Fitzrobin, both of Swindon, my executors and trustees. I give all my property whatsoever to my trustees absolutely, upon trust, to permit my wife Mary Jane to use and enjoy all my furniture, plate, linen, and household effects during her life. And as to the rest of my property (except the business of grocer, carried on by me at Swindon, and the stock-in-trade, fixtures, and goodwill, and book and other debts pertaining thereto or used therewith), to pay the rents, income, and profits thereof to my wife during her life on the usual quarter days; and after her death I direct my trustees to sell and realise the whole of my property, furniture, and effects (except the business of grocer carried on by me at Swindon, and the stock-in-trade, fixtures, and goodwill, and book and other debts pertaining thereto or used therewith), and to pay and divide the proceeds to and amongst my children living at the death of my wife. And as to my said business of a grocer, I direct my trustees to allow the same to be carried on during the life of my wife by my son Andrew, or if he dies, by such other child of mine as my trustees think fit. And my son Andrew, or such other child of mine who shall carry on the said business as aforesaid, shall render an account thereof once in every half year [or year, or quarter, as may be most advisable], and shall pay to my trustees [*half*] the profits shown on such account, and my trustees shall pay such profit to my wife. And as soon as possible after the death of my wife my said business, and the stock-in-trade, fixtures, and goodwill, and book and other debts pertaining thereto and used therewith, shall be valued by a valuer appointed by my trustees, and shall be



sold at the price of such valuation to my son Andrew, or if he declines to purchase it shall be offered to each of my other children in order of seniority, and the purchase money shall be payable by twenty [or any other number] half-yearly instalments. And my trustees shall pay and divide each instalment as it is received to and amongst my children living at the death of my wife. And I will and direct that if any child or children of mine shall die before the death of my wife leaving issue, the share of such child or children shall go and be paid as though he, she, or they had survived my wife and died intestate. In witness, etc. [as in Form I.].

Signed by the said testator, etc. [as in Form I.].

**Legacies and devises.**—In the forms of will given above I have not made any provision for specific or other legacies or other gifts, but only for a wholesale distribution of all the testator's property. Just one word as to phraseology. You have often, I daresay, noticed in wills the words "devise" and "bequeath." Each of these words means "give by will"; but "devise" refers to freehold property, while "bequeath" has reference to personal property, such as a leasehold house, stocks and shares, money, and so on. Thus, "I devise my house to my sister Jane" would be proper if the house were your freehold property. If you only had it on lease, you ought to say "bequeath," not "devise." Better still: don't use either word. Say "give," and then you are certain to be right. If you look at the forms on the preceding pages you will see that I have always used "give."

No particular form of words is necessary to be used in giving a legacy or devise by will. The best and most convenient plan in drawing a will is for the testator to mention first of all any articles or monetary gifts that he wishes to be given to members of his family, to friends or servants, before proceeding to deal with the bulk of his estate and effects. Thus:—

#### IV. Form of Will with Legacies.

**THIS IS THE LAST WILL** of me, James Blacksmith, of (address and description). I revoke all my former wills and codicils. I appoint John Blujeigh of Hatfield, grocer, and William Brownjones of Barnet, butcher, my executors and trustees. I GIVE to my son John my gold watch and chain and the Family Bible, To my daughter Margaret the work-box formerly belonging to my mother, To my son Thomas my double-barrelled shot-gun, To Martha Jellybag, my old and faithful servant, the sum of £—, To each of my executors the sum of £—, To the Reverend Josiah Binks, minister of Ebenezer Chapel, such one of my books as he shall select. [Now follows the Form I., or II., or III.]

People who have not a superfluity of this world's goods should be careful not to be too lavish of their legacies—that is, supposing there is a wife or family to provide for; for legacies like those I have set out take precedence before other gifts by the will. Thus, if I say in my will "I give £500 to my brother, and the rest of my property to my wife," my brother has first claim for his £500; and if there is not enough to satisfy him, there is nothing for the wife. I have known, and I suppose most English lawyers have had similar experience, testators so lavish with their gifts—"£10 to this man, £10

to that man, £50 to each of my trustees, £50 to this charitable fund, £20 to that charitable fund"—that after payment of debts, funeral expenses, and legacies, the estate has been so frittered away as not to leave a decent competency for the widow.

It is often advisable for a family man to make a will leaving his property to his widow for her life, and allowing her to distribute it amongst the children; that is, allowing her to say in what proportions the children shall take after her death. This kind of will is very frequently **the most proper will for a family man**. It has several advantages. In the first place, it does not leave the absolute uncontrolled disposition of the property in the widow's hands; still less does it make her the owner of it. This is an advantage because it renders her less liable to become the prey of a fortune-hunter; and we know that every woman, however clever, however experienced, or however old, is liable to be taken in by a plausible, smooth-spoken suitor. I suppose it is because a woman's vanity is always flattered by a proposal of marriage. A consequential sort of advantage is that the children cannot be disinherited altogether in favour either of a second husband, a second family, or the lady's spiritual director. On the other hand, seeing that the husband and father's will gives to the widow a discretion as to each child's share, it gives her considerable control over the children. For example, should a daughter marry some dissipated worthless fellow, the mother can tie that daughter's share up out of the reach of the wastrel husband. Should one of the sons remain single and accumulate wealth, while another, equally deserving, marries, has a large family, and is poor, the mother can give the poor one a Benjamin's portion.

When a will of this kind is made, giving such a discretion to the testator's widow, she has the power to exclude from any share whatever any one or more of the children, provided that she gives the property to a child or children. She cannot give it to anyone else; she cannot make a bargain with any of the children. Mr. De Brown made a will and left all his property to Mrs. De Brown for her life, with the power to distribute it amongst the little De Browns at her death. When she assumed widow's weeds, Mrs. De Brown was still young. So happy had been her experience of the married state, that she soon entered it again as Mrs. Von Smith. The second marriage was as fruitful as the first, and several young Von Smiths appeared. When the little De Browns grew bigger and reached the age of manhood, Mrs. Von Smith reflected how well off they would be, while her second family would be quite poor; for Von Smith, unlike the lamented De Brown, was deficient in worldly gear. So the mother talked the matter over with her son Augustus De Brown. Said she, "Under the will of your father I have the right to divide his property amongst you three boys in any way I please. I can leave it all to you, Augustus, if I like; and I will leave it all to you if you will promise me to give £100 apiece to your half-brothers and sisters." But Augustus declined the proposition. The anxious mother then made overtures to the second son, Horatio, who fell under the temptation. Accordingly the lady made a will, giving all the De Brown property to Horatio. But when she died, the other



two sons did not relish being left in the cold. They attacked Horatio, and proved that he had made a bargain with his mother. So the judge set aside Mrs. Von Smith's disposition, and distributed the property equally between the three.

It is a rule of law that if property is left with a power to someone to distribute it amongst a class of persons, and no distribution is made, the property must be equally divided amongst all the members of that class. For instance, if Mrs. Von Smith had not made any disposition of the De Brown property, it would have been divided equally between the three children.

### V. Form.

*[Property to widow for life, with power to her to divide it amongst children.]*

THIS IS THE LAST WILL of me, Lemuel Darklight, of 15, Skibury Road, Bristol, in the County of Gloucester, builder. I revoke all former wills and codicils made by me. I appoint William Greenbank, of Braxbourn Villa, Clifton, merchant's clerk, and Jameson Ryder, of Cole Road, Bristol, tailor, my executors and trustees. I give my gold watch and chain to my son Thomas, and my portrait painted in oils to my sister Jane, the wife of Henry James. And I give the sum of £10 to each of my executors. I give the rest of my property to my trustees, upon trust, to pay the rents, income, and profits thereof to my wife during her life. And after the death of my wife to pay and divide the same to and amongst my children or issue of any child or children who may be dead leaving issue, in such amounts, shares, and proportions, and in such manner as my wife by deed during her life or by her last will or any codicil thereto may appoint or direct. In witness whereof I have hereunto set my hand this second day of September, one thousand eight hundred and ninety-eight.

LEMUEL DARKLIGHT.

Signed and declared by the said Lemuel Darklight as and for his last will in the presence of us, Aaron Dobbs and Henry Hobbs, who in his presence and in the presence of each other have hereunto set our hands as witnesses.

AARON DOBBS,  
11, High Street, Bristol, schoolmaster.  
HENRY HOBBS,  
6, High Street, Bristol, clerk.

I will now give a form for the use of the wife who wishes to exercise the power given to her by her late husband's will of dividing his property amongst the children. I will take the case of Mrs. Darklight, who has the power given by the will immediately above (Form V.). We will suppose there were four children—Thomas, Mary, William, and Sarah. Sarah married one Jones, and died, leaving two children, Samuel and Martha. Mary is also married, and has an extravagant husband. Thomas has acquired considerable means of his own. William is a good fellow and a deserving, but not well-to-do. This is the kind of will that will serve:—

## VI. Form.

THIS IS THE LAST WILL of me, Eliza Darklight, of 2, Acacia Villas, Barton Road, Clifton, in the County of Gloucester, widow. I appoint my sons Thomas and William my executors. I give all my property [*this is for her own property, not her husband's*] as follows: One-fourth to each of my children, Thomas, William, and Mary, and the remaining fourth to the children of my deceased daughter, Sarah Jones, in equal shares. In exercise of the power given to me by the will dated the 2nd day of September, 1898, of my late husband, Lemuel Darklight, who died on the 1st of November, 1899, I appoint the property comprised in the said will as follows: The said property shall be divided into ten equal parts. Three of such parts shall go and be paid and transferred to my son William; Three to my daughter Mary, the wife of John Smith, without power of anticipation [*see below*]; Two to my son Thomas; One to my grandson Samuel Jones; and One to my granddaughter Martha Jones. In witness whereof, etc. [*as in Form V.*]

[*Attestation clause.*]

[*Two witnesses.*]

Note, please, that this will should refer to the other, and should state that the husband's property is "appointed."

The attestation clause is the clause by which the witnesses declare that the will was signed and declared in their presence, and witnessed by them in the presence of each other. It is not absolutely necessary to have this clause at the foot of a will, but it is most advisable. You never know whether a will is going to be contested or not. Very often you have a contest when you least expect it. And if a will contains an attestation clause in proper form, the fact that it is there is evidence of the fact that the will was properly executed and duly witnessed according to law.

**Married women** can now make wills. Before 1883 they could not, unless in exceptional cases. **Persons under age**—that is, under twenty-one—have no power to make a will. Before the Wills Act, 1837, a person of the age of fourteen and upwards could make a will of personal property, but not of land.

Testators should remember that it is possible to tie up **property left to a married woman** in such a manner as to put it out of her power to waste it. For example: "I give to my trustees the sum of £1,000, in trust for my daughter Mary for her life, *without power of anticipation*, and after her death to be divided amongst her children." The effect is that so long as Mary is a married woman she cannot effectually mortgage or otherwise encumber or dispose of her legacy. But if she becomes a widow, she can during her widowhood deal with her life-interest as she pleases. She cannot, of course, deal with the capital, because you have not left her the capital.

Another useful thing to know is **how to prevent an extravagant child or wife from wasting the legacy**. You cannot do it if you make an absolute gift. Thus, if you say, "I give £1,000 to John," you cannot prevent John from doing what he likes with it. But if you give John the interest of money, or the rents of landed property for life or something less than life, you can make such provision as will prevent your hard-earned wealth from falling into the hands of money-lenders and such like. You do it by giving the property



to trustees, upon trust, to pay the income or rents to John for his life or until he mortgages it or encumbers it or becomes bankrupt. Thus:—

"I give to my trustees [the sum of £—] [*or* my four houses situate at Fromburn] absolutely, upon trust, to hold the same and pay the income [*or* rents] thereof to my son John [*or* my wife] for life or until [s]he mortgages or encumbers the same or becomes bankrupt or does or suffers any act or thing whereby the said income [*or* rents] would vest in and become payable to any person other than my said son John [*or* wife]. And from and after the death of my said son John [*or* wife], or upon his [*her*] estate or interest determining by reason of such mortgage, encumbrance, or bankruptcy, or upon the doing or suffering any act or thing whereby the said income [rents] would vest in or become payable to any person other than my said son John [*wife*], to pay the said income [rents] to my son Felix."

The points to be remembered are (1) that the gift must be for life or *until* the other event happens; (2) That provision must be made for the estate to go to someone else immediately afterwards. The effect will be that John will not be able to borrow money on the strength of his legacy; and if he becomes bankrupt his creditors will not get it. I hardly advise this sort of restriction in a general way. As a rule, it is better to make an unrestricted gift. But there are occasionally cases in which a father is more than justified in reining his son in pretty firmly, when the son is a drunkard, a gambler, or any other kind of wastrel.

In a former book and chapter (p. 72) I have told you that a father has always the right to appoint **a guardian for his infant children** by his will. If the mother of the children is living, she acts as co-guardian along with the person appointed by the father. If the father appoints no guardian, the mother acts alone. An appointment of guardians may be made thus:—

"I appoint John Jones and Thomas Smith guardians of my infant children."

Most men, however, have sufficient confidence in their wives to leave the guardianship of the young children exclusively and entirely in their hands. But it is always a wise precaution on the part of a newly-married man or the father of a young family to provide against the contingency of his wife dying first, or surviving him and dying before all the children attain majority. To meet the case, insert at the end of the will, just before the words "In witness whereof," etc., this clause:—

"I appoint my trustees guardians of my infant children if my wife should predecease me, or after her death if she survive me."

In England there is some restriction on **gifts for charitable purposes**. A gift for the promotion of learning; for the assistance of the poor, the old, the sick; for the advancement of religion—*e.g.* a gift to found a church or chapel, or to endow the parson or minister with salary—and, in fact, any gift in favour of any useful object to benefit the public is called a charitable gift. Now, if you wish to leave money to charities, the law both of England and Scotland allows you to do it by your will as freely as to make any other legacy; and not only money, but any personal property—anything except land can freely be bequeathed. But **a gift of land to a charity** in England is another matter. Until 1891, except in a few very exceptional cases, a gift

of land to a charity was not allowed to be made by will at all; but by a Statute of that year the law has been radically changed.

There were three great objections to allowing gifts of land to charities by will; the first was the fact that such land was, as it were, withdrawn from circulation. Experience has proved over and over again that it is best to have land in such a condition that it can be freely disposed of. That is why the English law allows great facilities for getting rid of entails on estates. And experience has also shown that corporate, as distinguished from individual owners, do not readily dispose of land when they have not the means of improving it. The second objection was that a man might, in a fit of temper, disinherit his family by a hasty will. The third was that superstitious persons—especially those whose lives have not been of the best—might be persuaded to make deathbed wills in favour of religious objects. The Statute above referred to tries to guard against the two last objections by providing that, though land may now be given by will to a charity, the will must be made at least twelve months before the death of the testator, or else the gift must be a revival of a donation given by a previous will made at least twelve months before the donor's death. Thus, I wish to give ten acres of land to the Brighton and Sussex Hospital, and do so by my will dated the 1st of December, 1898. If I die before the 1st of December, 1899, the gift is invalid; but if I live longer, the donation stands. Again, suppose I live for twenty years—until 1918—and then, on my deathbed, desire to alter my will in other particulars, I can do so without endangering the gift to the hospital, by saying, "I give ten acres [*describing them*] to the Brighton and Sussex Hospital in the same manner and on the same trusts as I gave the said land to them by my former will dated the 1st of December, 1898," or some other similar words.

The first objection—namely, to having the land tied up—is met by the enactment that land devised by will to a charity is to be sold within six months from the death of the giver. The effect is to give to the charity not the land, but the price of it. To this rule there is one exception, namely, that the charity can retain in its own hands any land required for the purposes of the institution. Thus, in the case given in the last paragraph, the hospital might retain the ten acres of land for the purpose of a garden or farm whereon to grow vegetables for consumption at the hospital, or for building a convalescent home. But the charity cannot keep the land and let it out.

In Scotland, a gift to a charity is called a **mortification**, a word highly descriptive of the feelings of an impecunious nephew who finds that his maiden aunt has left all her property to the Society for the Prevention of Cruelty to Animals. The word is derived from *mors*, death; and is used because property not in the hands of an individual owner is said to be dead, or "in the dead hand." Such gifts are allowed in Scotland without restriction. An Englishman having land in Scotland can, therefore, give that land to a charity without restriction; though a Scot having land in England would have to conform to the English Statutes in respect of that land if he wished to bestow it in charity. That is, a will of English land in favour of a charity must be made twelve months before the testator's death, whether the testator be Englishman or Scot.



**Whom not to appoint as executors.**—Never appoint a married woman ; nor a woman who is likely to be married. There are two reasons for this : one, that her husband is highly likely to interfere and if you had wanted him to act you would have appointed him : the other, that it is very difficult to make a married woman responsible for any defalcation she may commit. In these days I omit any mention of the old reason that a woman is not so capable of transacting business as a man. Again, if your executors are also your trustees, and the trusts of your will are likely to last for some years, do not appoint a couple of old men. One of the pair should be of such an age as to render it highly improbable that he will die before the estate has been finally divided. Thus, if you leave your property to trustees in trust for your wife for life, and after her death to be divided amongst your children, take care to appoint at least one trustee of such an age that he will outlive your wife. If I were a man of fifty making a will, I should not appoint as my executors and trustees two men of my own age ; but I should ask two friends considerably my juniors to act for me. Then, again, it is advisable to appoint men of such substance or position that they cannot afford to be anything but honest. For this reason cashiers in banks, Government officials, managers of large works, and men in similar positions to these make highly desirable trustees. I may also be permitted to add that members of the Bar are usually accounted trustees of the first water. I speak from experience, and I know many of my learned brethren who are simply overloaded with trusteeships. The thing is always to appoint a man who is chained to a stake in the country.

#### MAKING A WILL IN SCOTLAND.

The law of wills in Scotland is entirely different from the English law. I have previously told my reader that while in England a man can leave all his property, or as much as he pleases, away from his wife and family, in Scotland he is bound to leave at least one-third of his movables to his widow and one-third to his children, and is only allowed the unfettered disposition of the remaining third of movable property, and the whole of his immovable or heritable property.

Then as to the **persons capable of making a will**, the Scots law excludes only the insane and pupils—that is, children under fourteen. Anyone of fourteen years of age and upwards, and in his or her right mind, can make a valid and effectual will and testament.

No particular form of words is required. It is enough if the testator clearly expresses his intention.

In one respect the law of Scotland makes will-making an easier matter than the law of the sister country ; for any document purporting to be a disposition of the testator's property after his death is good if it be in his own handwriting and signed by him. No witnesses are necessary in such a case. But, take notice that this only applies where the will is wholly written by the testator himself. Such a will is called a **holograph will**, and is recognised as valid in, I believe, every country in Europe. It is derived from the Civil Law of the Roman Empire, imported into the various parts of Europe by the clergy. This is a useful thing to know, for it enables you to advise a foreigner who may wish to make a

I Alexander Macgregor give  
after my death one-third of my  
whole property to my children  
equally amongst them and the rest  
to my wife. My wife to be executrix.  
Written and signed by me on the  
2<sup>nd</sup> July 1899 at my residence  
705 Cathedral Street Glasgow.

Alexander Macgregor.

SCOTSMAN'S SIMPLE WILL, WRITTEN WHOLLY BY HIMSELF.

(Overleaf will be found a Will to the same effect expressed in legal phraseology.)



I ALEXANDER MACGREGOR residing at 705 Cathedral Street Glasgow baker being desirous of settling the succession to my means and estate after my death do give grant and dispose to and in favour of my wife her heirs and assignees all my property and estate moveable and heritable belonging or due to me at the time of my death with the writs vouchers and securities thereof but under burden of my debts deathbed and funeral expenses and of the following legacies namely to pay and divide to and equally amongst my children living at my death one-third of the value of my moveable estate AND I nominate my said wife Jessie Macgregor otherwise Chisholm to be my sole executrix In witness whereof I have subscribed these presents written by John Burns of 702 Cathedral Street Glasgow writer's clerk at Glasgow the second day of July 1899 in the presence of the undermentioned witnesses

ALEXANDER MACGREGOR

JAMES BELL

800 Stirling Road Glasgow

Tailor

JEAN THOMSON

802 Stirling Road Glasgow

Sempstress

will, or to act yourself if you happen to have any property abroad. Only in England and Ireland a holograph will has no particular value. Do not misunderstand me. If one of my Scottish readers has English property, whether land or money invested, a holograph will made in Scotland is quite good enough to dispose of it. In the same way, an Englishman living in England can dispose of his Scottish property by a will made according to English law—that is, there must be witnesses. I want to make it clear that there is no necessity for two wills.

But the ordinary form of will in Scotland is not a holograph will, but a will written by someone other than the testator. In that case the person who writes it should put his name at the end, and there must be two witnesses to the signature of the testator. For in Scotland the testator must sign his will himself. If he cannot write, a notary public, or justice of the peace, or parish minister (in his own parish) may sign for him in his presence and by his authority, and in the presence of the two witnesses. The will must also be read over to the testator by the notary, justice, or minister, and the docquet or clause at the end must be in the handwriting of the notary, justice, or minister, and must clearly state that the will has been signed by the authority of the testator, and has been read over to him in the presence of the two witnesses whose names appear.

## VII. Form.

### [*Will of family man who gives all his property to wife, children, and grandchildren.*]

I, Alexander Macdonald, of 10, Bond Street, Glasgow, engineer, being desirous of settling and regulating the succession to my means and estate after my death, do hereby give to Donald MacPherson, of 17, Broomielaw, Glasgow, merchant's clerk, and Dugald McTavish, of 71, Clarges Street, Glasgow, shipbuilder, the whole of my means, property, and estate, In Trust for the ends, uses, and purposes hereinafter mentioned, namely (First) To pay all my debts, deathbed and funeral expenses, and the expenses of and incident to the execution of this trust (Second) my trustees shall implement the following legacies, namely, my piano to my daughter Jean Macdonald, my oaken writing-desk to my friend James Thomson [*and so on*] (Third) for payment of the sum of £[20] to my wife immediately after my death (Fourth) for payment to my wife of annuity of £— per annum, payable at Whitsunday and Martinmas in each year for all the days of her life, but the same is to be considered as alimentary *allenarly*, and not affectable by her debts or deeds or the diligence of her creditors (Fifth) for payment to each of my children of the sum of £—, as to my sons when and as they each respectively come to major age, and as to my daughters when they each respectively attain majority or marry, whichever shall first happen (Sixth) My trustees shall hold the rest of my means, estate, and property for payment of the annual income thereof to my wife during her life or widowhood, and after her death or remarriage, whichever shall first happen, for payment of the capital fund to and amongst my children absolutely, and if any child or children of mine shall die either in my lifetime or after my death but before the death or remarriage of my wife, then the child or children of such child or children of mine as have died shall take the share that would have been payable to his, her, or their parent had he or she been then living. And I declare that the above provisions for my wife and children shall be in full of all claims of *jus relictæ*, *terce*, and *legitim*. In witness whereof I have subscribed these presents written upon this and the [two] preceding page[s] by Andrew MacIntosh of a.



Portland Drive, Glasgow, merchant's clerk, at Glasgow, upon the twentieth day of August, 1899, before these witnesses.

ELIZA JOHNSTONE,

ALEXANDER MACDONALD.

15, Seymour Road, Glasgow, married woman.

ANGUS MACDOUGALL,

24, Gitland Place, Glasgow, schoolmaster,

# OR

In witness whereof, I have subscribed these presents written by myself upon this and the [two] preceding page[s] at Glasgow the twentieth day of August, 1899.

ALEXANDER MACDONALD.

The last is only to be used in the case of a holograph will (*see* p. 948). It is just as well if the testator has land or money in England or Ireland, to add an attestation clause (*see* end of Form I., p. 940) in the English fashion. It will save considerable trouble afterwards.

If the testator wishes to appoint guardians for his infant children, he can insert after (Sixth) clause, the clause given on p. 946, altering the word "guardians" to "tutors," which is the Scottish equivalent.

**Special clauses.**—It is not unusual also for the testator, whether in Scotland or England, to add, "I give my trustees power in their discretion to retain any of the investments of my property in which it may be placed at my death." If the testator leaves a business he should also take care, if he intends it to be carried on after his death, to say so, and to say by whom it is to be carried on, and to whom the profits are to go. Otherwise, the business will probably be obliged to be sold.

"**Alimentary allenarly**" is a peculiar Scottish law phrase. It is customary to give legacies or annuities to one's widow as "alimentary allenarly." Aliment is, in English, support—food, raiment, and whatever is necessary to support life. An alimentary gift is a gift to support the person to whom it is given. And "allenarly," the etymology of which I cannot explain, means "merely, only, solely and for no other purpose." It is a very emphatic word. And if you give your widow an annuity which is to be "alimentary allenarly," the effect is that the money must be paid to the lady for her support. She cannot mortgage it, or anticipate it, or squander it in advance. This kind of gift can only be given in England by a donation in the form given on p. 946.

**Mutual Wills** form one of the peculiarities of Scottish testators. As Lord MacLaren in his great work on Wills points out, the mutual will does not depend so much on any peculiarity of the Scots law as on a sort of national habit. It consists of a testamentary document by which two or more persons dispose of their property. If A and B make such a will it is really two wills, one of A's property, another of B's; and unless there is some reciprocal element, either of the two can alter or revoke the will as far as it relates to his property. Thus, A can make another will on totally different lines; and B can make another will. To put it another way, a mutual will is just as revocable as any other.

Mark, however, that you have a very different state of things if the mutual will is reciprocal. I mean, that if A and B agree to make a joint will on this

footing, "I will leave my property to you, if you will leave your property to me," and a will is made on that footing, it is not revocable by either party without the consent of the other. The reason is, that such a will is a contract to boot. As a rule, mutual wills are made by husband and wife in favour of each other: that is, the whole or part of the property of the husband is to go to his wife for her life if she survive him; and her whole property (or part of it) is to go to him if he survive her. Such a will as this cannot be revoked by the husband without the consent of the wife, nor by the wife without the consent of the husband, if—mark this "if"—the will is a contract for valuable consideration; "onerous consideration" it is technically called in Scotland. To put it in plain English, if the wife confers benefit upon the husband in consideration of his conferring benefit on her, there is clearly a contract between them which neither can escape from without the other's consent. But if all the benefit is on one side, the will is revocable. Generally, a mutual will by husband and wife can be made valid and irrevocable even when the wife has no property, by inserting a clause by which she agrees that in consideration of the benefits assured to her by the mutual will, she gives up all other claims she may have against her husband's estate after his death. That is to say, she is legally entitled after his death to one-third of his movables absolutely, and a life-rent of one-third of his lands. She gives up this claim by agreeing to accept some provision made for her by the mutual will. Thus the will is mutual, because there is consideration on both sides. Otherwise, the will would not be mutual unless the wife had property of which she gave the benefit to her husband if he survived her.

It is necessary to observe that although a mutual will cannot be revoked or altered without mutual consent, so as to take away any of the benefit conferred by one party on the other, it can be revoked or altered as regards benefits conferred upon other people. For instance, A and B make a will by which the whole property of both is to belong to the survivor for life, and after the death of the survivor is to be divided between X, Y, and Z. A cannot without B's consent take away from B the life interest in his (A's) property; but he can make another will revoking his gift to X, Y, and Z, and leaving his property after A's death to P and Q.

Again, neither husband nor wife can by making a "mutual" will deprive the children of their one-third [legitim or bairn's part].

#### CANCELLING AND ALTERING A WILL.

Both in England and in Scotland a will is a revocable instrument—it can be cancelled in whole or in part, or altered at any time. I wish, however, to clear the mind of my readers of one erroneous popular notion—to wit, that merely by making a later will the testator cancels his former will or wills. This is not so. If a man leaves two testamentary writings behind, they must be read together if possible. If the later of the two does not expressly revoke the former, you have, therefore, a difficult task. You have to take the two documents together, and give effect to the provisions of both, so far as it is possible to do it, because the two together constitute the dead man's will.



"But," you will say, "one of them may contradict the other. What then?" Well, then it will not be possible to construe and interpret them as one. And so far as the later provisions contradict or are inconsistent with the first provisions, the first provisions are cancelled and the later ones stand good.

For example:—I make a will to-day, by which I give £20 to Tom Jones, £100 to William Robertson, my gold watch to my son John, and all the rest of my property to my wife and children in equal shares; and I make another will to-morrow, by which I give £20 to Samuel Thompson, my gold watch to my daughter Joan, and one-third of the rest of my property to my wife, one-third to my children, and the remaining third to the Glasgow Infirmary. I do not state, in the second will, that I revoke the first. I do not destroy it, nor score it over, or anything of that kind. The case stands thus: Jones takes his £20, Robertson his £100, Thompson his £20. As to the gold watch (presuming that I have only one), Joan gets it; because on this point the later will conflicts with the former one. And as to the residue of the property, it goes as directed by the second will; because here, again, there is an irreconcilable conflict between the two.

Now probably the testator in such a case never meant that any part of his former will should take effect. But he should have said so, or done something to indicate that the first will was cancelled. So that if you wish to cancel a will, take care that any subsequent will contains a clause revoking "all former wills and codicils."

A will may also be **revoked by cancellation or destruction**, as by tearing or burning, if done by the testator, or with his authority, with the intention that the will should not take effect. Thus, if a will is found with the signature crossed out, or cut out, or with lines scored all over it, or with a line drawn through some essential part, the will is not necessarily to be treated as a nullity. It must be taken to be a valid document unless it can be shown that the testator meant to cancel the will, and defaced it or caused it to be defaced with that intention. This rule has been adopted because it is the only safe one. For nothing would be easier than for an unscrupulous person whose interests would be injuriously affected by a will, if he obtained momentary possession of it, to draw a line through the signature, or otherwise deface the document.

Now let us take the case of a will that is not apparently cancelled or defaced as to the signature or as to an essential part affecting the document as a whole, but has **some parts crossed out**. The rules are slightly different in England from those in Scotland.

*In Scotland*, if you find a will with, for instance, a legacy scored out, the will as a whole is not affected. You confine your inquiries to these questions, "Did the testator himself score out that legacy, or tell someone else to do it for him?" And, "If the scoring out was done by the testator or by his direction, did the testator mean to cancel the particular part scored out?" Of course, if you cannot prove that the will-maker made or authorised the crossing out, the part stands; for the mutilation may be the malicious work of a scoundrelly swindler. It is at once more difficult and more easy to prove

that the part in question was scored out with the intention of cancelling it. I will take it that you have given a legacy of £20 to Macpherson, who afterwards displeases you, and you wish to cut him out of your will. You take a pen and draw a line through the words creating the gift; and then, in the margin, opposite those words, you sign your name or your initials. The signature or initials (on proof that they are yours) are evidence both of the fact that you scored out the words, and that you meant to cancel the legacy. If you do not affix your signature or initials, there may be trouble; for anyone who tries to deprive Macpherson of his little legacy will have to prove that you did the scoring out, and that you intended it for a cancellation. And that will be difficult of proof in most cases.

*In England*, a crossing out is a much simpler matter. If it can be proved to have been done before the will was originally executed, the crossing out stands. It is safer, however, for the testator and the two witnesses to put their initials in the margin opposite the crossing out; or else to make a note at the foot stating that such and such words have been crossed out, the note being signed by testator and witnesses. If the crossing out is not proved to have been done before the will was signed, it has no effect whatever. To put it another way, if you duly make a will, and afterwards cross out a part of it, the crossing out has no validity, and the will is read as though there had not been any such crossing out. If you wish to cancel (say) a legacy of £20 left to John Jones, you have two courses open to you: (1) you can summon two witnesses, cross out the words relating to Jones's legacy, sign the will again, and ask the two witnesses to sign their names. Be sure to follow the directions given on pages 937-8 as to the witnessing of a will, and it is best to put something of this kind:—

"Re-executed by me as and for my last will and testament, the [first two] lines on the [second] page having been crossed out and cancelled this tenth day of September, 1899."

[Signature of testator.]

[Attestation clause as in Form I., p. 940.

and signatures, etc., of two witnesses.]

But it is far better to make your cancellations by a codicil. A codicil in England means a sort of supplement to a will. In Scotland it means a trust deed or will by which no executor is appointed. I use the term in its English sense. Suppose you wish to cancel Jones's legacy, nothing is easier than to take a pen, seize your will, and write thereon:—

"This is a codicil to my will dated the [insert the date of the will]. I revoke the legacy given by my will to John Jones."

[Signature.]

[Attestation clause

and witnesses.]

In a word, the English law is that a will cannot be altered except by another document executed in exactly the same way that a will is executed. If you cross something out of your original will, that is trying to make a fresh will; and therefore the document, as altered, must be re-signed and re-witnessed. But beware of crossing out. Stick to codicils.



**Alterations and interlineations** in a will are to be avoided. *In Scotland*, when you find a man's will with something interlined, you take no notice of the part interlined unless it is sanctioned by the signature or initials of the testator in the margin opposite to the interlineation. And it is the same with words or sentences crossed out and others written over the top. Thus, if when a will comes to be read you find—

Ten

"I give a legacy of ~~Twenty~~ pounds to Andrew Macpherson,"

you must take no notice of the crossing out of the word "Twenty" and the substitution of "Ten," unless the testator's signature or initials give authority to the alteration. So that if there is no signature or no initials, Andrew Macpherson is entitled to his £20 legacy as originally written. The reason is that if the alteration is not in the deceased man's handwriting, you assume that he gave no authority for it to be made; while if it is in his handwriting, you assume that he half-intended to make the alteration, and then changed his mind again. If I cross out one line of my will and substitute another, the cancellation of the original writing is conditional upon the substituted words taking effect. And, as I have shown, a clause not originally in the will does not take effect unless signed or initialled by the testator.

**In England**, as I have already stated (p. 953), no alteration in a will can be made except by another fresh testamentary writing—*e.g.* a codicil—or by re-executing the will, in its amended form in the presence of two witnesses as detailed in the section on Will-making.

**Wills destroyed** may be destroyed by accident or by design. A will destroyed by the man who made it, if destroyed with the intention of cancelling it, is effectually cancelled. But, observe—merely putting a will in the waste-paper basket, or crumpling it up and throwing it in a corner, does not make the document waste paper. To admit such a doctrine might lead to no end of fraud. And even to prove that the testator burnt his will, or tore it to pieces, is not enough unless you prove also that he intended by that act to make the paper of no effect; for he may have burnt it by accident, thinking it was some other paper. And as to throwing a will into a waste-paper basket or into a corner, it is well known that eccentric folk, and people of untidy habits, throw important documents about and put them in all manner of odd places. A will of a rich old lady was found the other day in an old boot; and a well-known miser used to keep his in a flower-pot. It would, therefore, not be very safe to draw conclusions from the locality in which the will is found.

Let me say, though I suppose it will be obvious to many of my readers, that a testator cannot revoke or alter a will once made unless he is of sound mind at the time of such revocation or alteration. So that if I were to make my will and afterwards become insane, the will would be practically irrevocable; unless I had a lucid interval. The reason is that the destruction or obliteration of the document containing the expression of the testator's will is only effectual as a cancellation when done with the intention of

revoking the will. And intention is a state of mind requiring an understanding of the act done. Now, a madman has no understanding.

**Lost wills** are great food for playwrights and sensational story-tellers. And most of the fictional incidents of these amusing personages are based on the notion that if a will is lost it is a nullity. Such a notion is a great mistake. It is quite possible for a will that has been lost to take effect, if anyone can be found who knew the contents of it and can remember them. The great English case is that associated with the name of Lord St. Leonards. Ironically enough, the noble lord, who had filled the greatest position open to a lawyer—that of Lord Chancellor—was the greatest authority of his time on the law of wills. He wrote a book, when at the Bar, “*Sugden on Wills*,” which was a monument of learning on the subject. While yet a barrister, he was engaged in every difficult and important case on wills that came before the Courts. And when the great pundit died, his own will could nowhere be found!

But Miss Sugden, a daughter of the house, was almost as great a lawyer as her father—at least, so ran the common fame. And she earnestly declared that her father had not died intestate, but had made a will, in the drawing up of which she had assisted. And she went on to declare that she remembered the contents perfectly well. The result was a lawsuit, but the persistent and learned lady carried her point. For the Court decided that when it is established that a person has made a will, and there is no evidence that he ever revoked it or destroyed it with the intention of cancelling it, you are to presume either that the precious document is still in existence, though it cannot be found, or that it has perished by accident, or else that it has been made away with by someone who had no business to touch it. I do not insinuate for a moment, nor was it ever suggested, that the will of Lord St. Leonards had met with foul play. The point established by Miss Sugden was that a missing will can be proved in the same way that you can prove the contents of any other missing document—namely, by the verbal testimony of someone acquainted with its contents. Naturally, the Court will require very trustworthy evidence in a case of this kind, for the good and sufficient reason that the person with the best knowledge of the subject is dead. Therefore, if you seek a declaration from the Court in favour of a will which you are unable to produce, it will not be enough for you to say “*I think*,” or “*as far as I can remember*,” or “*to the best of my recollection and belief*.” You must be prepared to pledge your oath in the most positive manner as to the contents of the lost writing.

I am not acquainted with any decision of the Scottish Courts of similar effect to the English decision in Lord St. Leonards's case. But I see no reason, on the proper rules of jurisprudence, why the principle of that case should not be part of the law of Scotland.

In England, **marriage** cancels a will previously made, even though made in favour of the lady who afterwards becomes the testator's wife. In *Scotland*, also, a man's will is to some extent cancelled by marriage, for the wife immediately becomes entitled to her third share of the movable property, and the children to their third share, or legitim. But as to the dead's part, or third of movables of which a testator has the uncontrolled disposal, the will remains effectual.



## CHAPTER II.

### EXECUTORS, THEIR DUTIES AND LIABILITIES.

Accepting or declining the office—Proving the will—Proving a disputed will—Confirmation in Scotland—Winding-up the estate—Getting in the property—Funeral and testamentary expenses—Executors not entitled to remuneration—Exceptions—Paying debts—How executor may protect himself—England—Scotland—Order in which debts are payable—In England, not bound to distribute money evenly—Otherwise in Scotland—Right to retain personal debt—Duty payable to Government—Legacies—Order of payment—How to act when not enough to pay all legacies—The testator's land—Order in which funds are applicable for debts—Liability for co-executors.

**M**OST people ought to be interested in this chapter, because, I suppose, there is no office that a man is so likely to be called on to fill as the office of executor. I want to distinguish between the duties and position of an executor and the duties and position of a trustee. To put it broadly, an executor's business is to wind up the worldly affairs of the deceased. The business of the trustee, on the other hand, is to look after the property handed over to him by the executor, to administer it, and apply it in the manner directed by the will or deed of trust.

In this chapter I shall look at things from the point of view of a man who has been appointed executor.

The first thing for him to consider is **whether he will accept the office**. If he decides not to accept it, he should make up his mind quickly, and firmly refuse to have anything to do with the deceased's affairs. He may be called upon to execute a formal renunciation. He is not obliged to do this unless he chooses, but can leave the other executor or persons interested under the will to serve him with a formal notice either to "prove" the will or renounce. An executor accepts office by "proving" the will.

**"Proving"** a will is a judicial proceeding. In England it is done by taking the document either to a District Probate Registry, or to the principal Probate Registry at Somerset House, London. It is always advisable to employ a solicitor to do this business for you. If, however, you think you can do it yourself, and have plenty of time to spare for the purpose, you can go to the Registry and obtain forms to be filled in. All executors have to swear an affidavit, (1) As to what the property of the deceased consisted of, and what was its value at the time of his death; (2) That they will well and truly administer the estate.

When the will is not contested, the officials at the Probate Registry make

a copy of the will on parchment and hand it to the executors when the duty is paid. I shall have something to say about this duty at the end of the chapter. This parchment document is called the Probate Copy of the will, and forms the legal authority of the executors to act in their office, and their title-deed to the property of the deceased. Thus, suppose the testator has money at his bank, the executors take the Probate Copy to the bank, satisfy the banker that they are the executors who proved the will, and then the banker must hand the money over to them on demand. The actual will is retained at the Registry. It becomes a public document, and is preserved for the information of the present and the edification of future generations. Anyone is at liberty to inspect it on the payment of one shilling.

But it may happen that when you go the Registry to prove the will, you find a *caveat* entered against it. To take an example: I have a rich uncle, whose nearest relative I am, and I naturally expect some of his wealth. But when he dies I hear nothing of any legacy. So I go to Somerset House, and to the Registry of the district in which he lived at the time of his death, and fill up a form in which I state that I object to the executors of any will of John Smith, late of Plumtree House, Newark, being allowed to prove that will. When the executors of my uncle go to the Registry, the clerk there tells them that a "*caveat*" has been entered against them, and that he cannot allow the will to be proved. The executors at once give me notice to remove my *caveat*, and if I don't comply, they bring an action against me in the Probate Court. When the trial comes on, they produce the will in Court, and prove by evidence that it was legally executed; and then I must say what my objection is, and prove it by testimony. Thus, I may be able to prove that at the date of the will-making my uncle was not in his right mind, or that he was subjected to undue influence (*see* p. 938), or that the document is a forgery, or that it was revoked. But if I cannot substantiate my objection, the action goes against me, and the executors are adjudged entitled to have the will proved. This is called, "proving the will in solemn form."

*In Scotland*, the procedure is somewhat similar. A Scottish executor takes the will to the Commissary [Sheriff's Court] of the county where the deceased resided at the time of his death. If he had more than one residence—*e.g.* a house at Glasgow and a house at the coast (say, Rothesay), the proper county is that in which the principal residence was—probably in such a case the principal residence would be the one at Glasgow. If the testator had no settled residence, or if he did not reside in Scotland, the Commissary at Edinburgh is the proper person to resort to. The executor makes out an inventory of all the testator's movable and personal property, wherever situate; but he must distinguish between movables situate in Scotland and those elsewhere. On paying the duty exacted by the Government (called Inventory Duty), the Commissary "confirms" the executor in his office, and this "confirmation" answers to the English "probate." That is to say, it vests in the executor all the property comprised in the inventory. That property becomes the executor's in the same manner as it formerly belonged to the deceased.

*In Ireland*, probate is obtained in the English fashion.



It may happen that the testator had **property in several parts of the United Kingdom**. For instance, he may have money invested in the Clyde Trust, in Scotland, in the London General Omnibus Company, in England; and in the West of Ireland Railway. In that case, if the testator resided in England, the executor proves the will there, and then takes the probate copy to Edinburgh, to the office of the principal Commissary, and has it sealed by him. This will be done as a matter of course and without trouble, and operates as a confirmation of the will according to the Scots law—that is, it vests in the executor the Scottish property of the deceased. Then the executor takes the probate copy to Ireland, to the principal Probate office in Dublin, and has it sealed there—also as a matter of course; and this enables the executor to deal with the Irish investments. The course is the same when the deceased resided in Scotland or Ireland. On the executor obtaining confirmation or probate, he can take the will to the proper office in the other two countries of the United Kingdom, and have it formally sealed so as to give him a legal character in each country.

The will being duly proved or confirmed, the executors **begin to wind-up the estate**. As a general rule, this ought to be done with the utmost expedition; for unless there are special circumstances to justify delay, executors are supposed to take only **a year to finish their work**. They have, therefore, no time to lose, for in the case of a man of business or a man of decent means there will be a great deal to do.

The first duty of executors is **to bury their testator** in a suitable manner. This, of course, is done long before the will is proved. As to what is a suitable style depends on the rank, position, and means of the deceased. Thus, while a wealthy merchant's executors would be held justified in spending a few hundreds on funeral arrangements, the executors of a clerk at £3 a week, who left behind only £500—his life insurance and some money in a building society, say—would be held guilty of extravagance if they went beyond £20. All reasonable funeral expenses will be paid out of the estate; but expenses improperly incurred will be charged to the executors personally. Is **"mourning,"** the "customary suit of solemn black," a proper funeral expense? Take this case: A man dies, leaving all his money to his wife for life, and afterwards to his children. At the time of his death he has living with him in the house a poor sister, or an orphan niece. In very many cases the widow, or one of the executors, orders mourning clothes to be made for all the people living in the house, including the sister, or niece, and the servants. Let me say at once that unless all the persons entitled to the property under the will consent to that course, it is quite illegal for the executors to pay for the woful garb of anybody. The one who ordered the things must pay for them; nor can he claim to be reimbursed out of the property of the deceased. This ought to be pretty evident when I say that funeral expenses come first in the list of debts to be paid. They take precedence of all the creditors of the deceased; and it would be absurd to allow money to be wasted in the purchase of new clothes which might be wanted to pay the just debts of the testator.

When the funeral is over, and the will is proved, the executors must with all speed **collect and get in the property** of the deceased. Thus, they go to his bank, produce the probate copy (*see* p. 957), and have the money standing to the testator's credit transferred to their names. If he has any money invested in the public funds, they produce the probate copy at the Bank of England, and cause the stock to be transferred into their names. The like with regard to shares in companies—accomplished by transmitting the probate copy to the secretary of the company at the company's registered office. Life insurance money should also be looked after, by giving immediate notice to the office, who, on proof of the death and on production of the probate, will pay the money over to the executors. Debts due to the deceased should be collected with promptitude. Executors have no right to allow a debt to remain outstanding, even though the debtor is paying interest on it. They have the right to compromise disputed claims; but if a debtor to the estate does not hurry up about paying, legal proceedings should unhesitatingly be instituted. An executor who gives time—that is, a long time—to a debtor is liable to make the debt good out of his own pocket if the debtor should ultimately fail to pay it; as, for instance, if he becomes bankrupt. Not that you need sue a debtor who is notoriously insolvent. That would be throwing good money after bad. But you must not be indulgent. You must take advantage of every means allowed by the law to get the money, or as much of it as you can.

Just as **peremptory is the collection of money out on personal security.** The testator may have lent £50 to somebody on personal security at interest. You must not continue the loan. For personal security is no security at all; and though the testator might have had special reasons for lending the £50 without security, those reasons do not affect you. It is not good business to lend money in this way; and executors must cast aside sentiment and stick to business. The only justification for executors allowing a personal loan to remain outstanding is a specific direction in the will to that effect. Such a direction exonerates the executors; for they have to carry out the testator's will, and the direction is part of his will.

Another point about which executors must be very careful is **the winding-up and sale of the testator's business.** As I have indicated in Chapter I. of this Book (p. 941), executors have no right to carry on their testator's business unless he expressly authorises them to do so. I do not mean by this that if the deceased had a shop the shop must at once be closed. By no means. The executors have the right, and it is their duty, to carry on the business for the purpose of winding it up. But they must get rid of it as soon as possible. If they can sell it, lock, stock, and barrel, shop, stock-in-trade, fixtures, goodwill, book debts and everything—get rid of both assets and liabilities at one blow—they ought to do so. But if no purchaser is forthcoming for the whole concern, they must realise the stock and fixtures, collect the debts, and sell the goodwill (if they can sell it) separately.

It may happen that the testator has left no directions for the carrying on of his business, but he has a son or sons who would like to buy it and



carry it on, but cannot raise the money to pay cash down for it. They are, however, willing and anxious to pay by instalments extending over a period of years. The executors are anxious to sell to them. Can they do it? Well, if all the people interested under the will are willing to consent to this course, and are of age, the executors should obtain from them all a written consent to the proposed arrangement, and then it can be carried out. But if some of the people interested are under age, or one of them objects, the executors had better consult a solicitor, and ask him to apply to the Chancery Division of the Court on their behalf for leave to sell to the sons on the terms proposed. Such leave will be granted when the judge thinks the arrangement beneficial to the estate; but he will not be ready to sanction the sale if a person or persons entitled to large shares under the will have a strong objection. Still, it is within his lordship's discretion always; unless, indeed, there is not enough ready money in the hands of the executors wherewith to pay all the creditors of the deceased. For creditors are entitled to first consideration.

Having collected the money and realised the property of the deceased, it is the duty of the executors to **pay all debts**. The first thing to be paid is **funeral expenses**, bearing in mind what I have said before (p. 958), as to those expenses being confined to the necessary cost of interring the deceased in a manner suitable to his rank and station. The next charges to be met are the **executors' expenses**, incurred by them in carrying out the duties of their office. Let me say here that executors are entitled to employ all such assistance as a reasonable business man usually employs in doing his own business. Thus, for the purpose of proving or confirming the will the executors are entitled to obtain the assistance of a solicitor or writer. They are, of course, liable personally, as between the lawyer and themselves, to pay the lawyer's bill. True, the work is not being done for the personal benefit of the executors; but that makes no difference. If I retain the services of my solicitor to draw up a deed, or bring an action, it matters not who is to have the benefit of the work when it is done; I must pay the solicitor because I employed him. It may be that when I have paid the bill I have a claim against somebody to recoup me what I have paid. And so it is with executors. If they employ a lawyer to prove the will or conduct actions at law against the debtors of the deceased, when they have paid the lawyer's bill they may recoup themselves out of the moneys belonging to the deceased's estate. The like applies if they employ an auctioneer to sell the dead man's furniture by auction, a stockbroker to sell his stocks and shares, or a valuer to value property for the purpose of winding-up the estate. The fees of such persons are a personal liability on the shoulders of the executors; but these can, if the employment of those agents was necessary and proper, claim to be repaid out of the estate.

Under the same heading come the personal expenses of the executors. **Mind, executors cannot charge anything for their trouble and time.** For example, I am executor for a testator who had business relations with a man in Aberdeen. There were cross accounts between them; and in order to finish the business properly and obtain a proper settlement it is necessary

for me to go to Aberdeen and see this man. Accordingly I make the journey from London, and am absent from business for three days in consequence. As a result, I lose business to the value of £25; besides which my services to the estate in making a satisfactory settlement are worth a great deal—£10, at a moderate estimate. But I can charge nothing—not even the £25 I have actually lost. I can only charge my railway and cab fares, my hotel bill, and other actual out-of-pocket expenses. So far is this rule carried that an executor who is an architect, and who prepares plans for the estate, cannot charge for them. If he be a stockbroker, and sells the deceased's stocks and shares, he cannot charge the usual business commission. If he be a solicitor, he cannot charge any law costs.

The only exceptions to this rule are (a) when the will expressly says that executors may charge for services rendered, and (b) when an executor makes a bargain with the legatees that he is to be paid for his trouble. But in the latter case he must be careful (especially if he be a lawyer) to explain to the legatees that he has no legal right to make any charge.

As you will have gathered, executors have **a right to employ agents** to do work ordinarily done by persons of a particular class, and involving particular skill or professional or business knowledge—a lawyer to sue for a debt, an accountant to examine and prepare complicated accounts, and so on. But any business which an ordinary man could do himself, the executors must do personally. If they employ an agent to do it for them, they must pay him themselves.

After funeral expenses and the expenses of collecting and realising the property, debts, etc., come **the debts of the deceased**. Executors ought to be very careful indeed not to pay any legacies before they have paid all the debts. In England, an executor who pays a single legacy is assumed to admit that he has in his hands a sufficient amount to pay all the debts, and he will be compelled to pay all the debts, even though he has to put his hand deep into his own pocket for the purpose. It becomes important, therefore, for an executor to know what claims there are against the estate—that is, what debts and liabilities the deceased had. You can easily see that it would be a very serious matter if an executor, after paying all the claims he knew of, and distributing the rest of the property amongst the legatees, were to have a heavy claim made against him by some creditor of whom he had never heard. If an executor had to pay such a claim he would, it is true, be entitled to go to the legatees and say to them, "I paid your legacies under a mistake. You must refund." But it is possible that the legacies might be spent, or the legatees might not be physically able to repay them; or they might have left the country, or half a hundred things might have happened.

**How, then, can an executor protect himself in England?** There are two ways. He can throw the whole estate into the hands of the Court, to be administered there, and then the Court will find out who the creditors are by advertising for them in the public newspapers. But this course is to be deprecated, on account of its expensive character. And, moreover, an executor



who does it without strong reasons will have to pay all the expenses himself. There is, however, another and a better way. Let the executor, if he thinks that there are or may be claims that he is unable to trace, do what the Court would do. That is, let him advertise for all claims to be sent in to him or his solicitors. The advertisement should be inserted in one London paper, and also in one paper circulating in the district or districts where the testator resided. For example, if the testator had a town house in Bristol, and a country house in Dartmoor, the proper course would be to advertise a few times in one London paper, one Bristol paper, and one paper circulating in the towns and villages of Dartmoor—either an Exeter or a Plymouth journal. The advertisement should run in this form:—"James Thomas, deceased. All persons having claims against the estate of James Thomas, deceased, late of 12, Cowry Street, Bristol, and of Dunkeld House, Bovey Tracey, coal-merchant, are required to send in their claims within three months to the executor, Samuel Johnson, 10, Bolt Street, Bristol." The advertisement ought to appear on about three occasions at short intervals in each newspaper; and it is important that the deceased should be fully described, so that anyone who knew him or had dealings with him, would immediately know whom it referred to.

After the three months, or other reasonable time named in the advertisement has expired, the executor may pay the claims that have come in, and deal with the rest of the money as the will directs. That is, he either distributes it amongst the legatees or else hands it over to the trustees who are to hold it in trust. As to the order in which debts are to be paid, *see* page 963.

*In Scotland*, the system is, I think, better than the English plan. A Scottish executor cannot be called upon to pay away any part of the estate for six months after the death of the testator. This is to give him time to see whether or not the estate is solvent. In order to ascertain this, he ought to make inquiries, and to examine the testator's books of account and other papers. At the end of the six months, if on reasonable grounds and after proper inquiry, he thinks there is enough to pay everybody, he may pay the debts. He ought not, however, to pay anything before the six months, unless the solvency of the estate is beyond question; for if he does, he will make himself personally responsible.

After the six months he will be exonerated if, having paid all the debts he knew of, he distributes the balance to the legatees. *Bona-fide* ignorance of debts, or *bona-fide* belief that the creditor has abandoned his claim, will be enough to relieve the executor from responsibility. If any claim is made of the righteousness or legality of which the executor is not convinced, he is quite justified in requiring the creditor to prove his claim in a court of law. Frivolous or captious objections should not be raised; for an executor who puts a creditor to needless expense, will have to make that expense good out of his own pocket.

It may turn out, at the end of six months, that the property is not enough to meet all the claims justly made upon it. The executor can only

then protect himself by applying to the Court to administer the property ; for which purpose a lawyer should be consulted.

**Order of payment of debts.**—In Scotland there is no particular order. Either there is enough to pay everybody or there is not. If there is, the order of payment makes no difference to anybody. If there is not, the Court will see to the distribution of the funds amongst the proper parties.

But in England the case is very different. Some debts must be paid in full though there is nothing left for other people. The first class is (1) *debts due to the Crown*. After these are paid come certain debts to which (2) *priority is given by Statute*. Thus, if the deceased was an officer of a friendly society having money of the society in his hands, this must be paid in full to the trustees of the society. Again, if he is the overseer of the parish, and owes the parish money, the parish has a claim in front of ordinary creditors. Rates and taxes, again, come before ordinary debts. Next in order are (3) *judgment debts against the testator*. I mean that if Brown had a claim for £100, and in the deceased's lifetime he raised an action in the Courts and was successful in obtaining judgment, Brown's £100 must be paid before anything is paid to Smith, a creditor who did not sue and did not, therefore, obtain a judge's decision in his favour. A judgment of a foreign court does not count in this class. It ranks with ordinary debts. Suppose one or more creditors have raised an action against the executor for a debt due from the testator, and (4) *judgment against the executor has been obtained*, this amount must be satisfied after payment of those creditors who obtained judgment against the deceased in his lifetime. Then we come to (5) *all other debts due on contract* by the deceased—including rent. These all come together. And last of all, (6) *voluntary bonds* ; by which I mean promises by deed under seal by which the deceased bound himself to pay money, but without valuable consideration (*see* p. 276). To take an example, suppose the deceased had a poor relation on whom he, out of pure good feeling, had settled an annuity of £52 a year ; and had made a deed promising to give this £52 a year so long as the poor relation lived the promise is a binding one, but the executors cannot recognise it until they have paid all other debts.

A rather curious thing is that the executors in England are **not bound to distribute the money evenly** amongst creditors. For example, Jones dies owing £10,000—£3,000 to Smith, £2,000 to Brown, and smaller sums to other creditors. All the debts are ordinary contract debts. But Jones's effects only realise (after paying funeral and testamentary expenses) about £2,000. Jones's executors can pay the whole £2,000 to Brown, leaving Smith and the other creditors to whistle for their money. Their only remedy, if they suspect anything of the sort, is to take prompt action in the Court against the executors before they have had time to pay away the money, and so secure an even-handed distribution. The only thing an executor must not do is this : he must not pay debts out of their class order. That is, he must not pay an ordinary creditor before he pays a creditor who recovered judgment against the deceased. And he must not pay a judgment debt before a Crown



debt, and so on. To put it another way, so long as the executor sticks to the order given in the last paragraph, he need not preserve the balance between the individual creditors of any class.

Thus, Thomas had got a judgment at assizes for £1,000, and Williams another for £1,000, both against the deceased in his lifetime. £300 is also owing for butcher's, baker's, and tailor's bills, and for rent; £10 for taxes, and £12 for rates. The whole property is only £500. It costs £20 for funeral expenses, £20 to prove the will, and £20 for legal and other expenses necessarily incurred by the executors—leaving £440 available to pay debts. First comes the £10 for taxes, in full. Next, also in full, the £12 for rates. This leaves £418. The executors have a perfect right to pay it all to Thomas. Williams, though in the same class (namely, judgment creditors), may go hang, unless he is sharp enough to apply to the Chancery Court before the money is made over to his rival creditor.

Both in England and Scotland **an executor has a right to retain his own debt.** That is to say, if the deceased owed money to the executor, the latter can satisfy his own claim before he pays anybody else (except, in England, the classes marked (1), (2) and (3) in the order of payment). The reason is plain. He cannot raise an action against himself; and unless he could retain his own debt he would be worse off because of his executorial position. This would be decidedly unfair, and so he is allowed the privilege I have mentioned. And as it is about the only privilege attaching to his office, let no one grudge it to him.

**Duty payable to Government.**—When an executor goes to claim probate (confirmation in Scotland) of a will, he is bound to make a list or inventory of the property. This is somewhat less specific in England than in Scotland. He is also bound to furnish a valuation of the various items of the estate. Against this he sets the whole of the funeral expenses, and all debts due from the estate. A balance is then struck, giving the net or clear value of the property left by the deceased; and the Government claim a percentage according to the amount. If £100 or under, no duty is payable. If the value is from

£100 to	£500, 1	per cent.
£500 "	£1,000, 2	"
£1,000 "	£10,000, 3	"
£10,000 "	£25,000, 4	"
£25,000 "	£50,000, 4½	"
£50,000 "	£75,000, 5	"
£75,000 "	£100,000, 5½	"
£100,000 "	£150,000, 6	"
£150,000 "	£250,000, 6½	"
£250,000 "	£500,000, 7	"
£500,000 "	£1,000,000, 7½	"

And anyone who finds himself executor of an estate worth over a million pounds will have the satisfaction of paying 8 per cent. of it for the use of the country.

After payment of debts and duty, it becomes the business of the executor to pay legacies. As I have told my readers, legacies of particular things or particular amounts come before those gifts which are called "residuary." For when a testator winds up his will, as every prudent testator ought to do, by saying, "I give the rest [or residue] of my property to Blank," this means that he gives to Blank what remains after paying away the property previously mentioned. Now, there are three kinds of legacies, and each kind of legatee has rights and runs risks different from those of other legatees.

The first kind of legacy is called a **specific legacy**. As its name implies, this is a gift of a specific article. Thus, "I give my gold watch to my son John; my piano to my sister Mary; my black mare, Telegraph, to my cousin Thomas"—these are all specific legacies. Now, assuming that there is enough to pay the funeral and testamentary expenses and creditors without touching the articles thus specifically given, the executor ought not to touch those articles, but to hand them over to the persons named in the will. But supposing that there is not quite enough to pay the creditors. There is only £10 short; so there is no reason to sell the watch, the piano, and the mare. Any one of the articles will realise sufficient to make up the small deficiency. Which must the executor sell? Naturally, if he touches the watch, son John will be angry, and will say, "Why don't you take the piano, or the mare? I know that my father especially wished me to have his watch. He had many times promised it to me." And if the executor lays hands on the piano, sister Mary will want to know why he doesn't take the mare or the watch. And so on.

But the poor executor must sell one of them; for he must pay the debts of the estate. Now he is not bound to pick and choose, or to put himself to any inconvenience. Let him sell whichever article he can most readily dispose of. And in case there is not very much choice in that way, by reason of all the things being easily saleable, let him draw lots, or toss up for it, or decide in any other chance way, unless he has any reason for giving the preference to one or other rival. When I have had to act as executor, or to advise executors, I have said, "Take the articles in this order:—begin at the last one mentioned, and work up to the first. For the chances are that the first-mentioned legatee was foremost in the deceased's mind." In the case given in the last paragraph I should sell the mare first, then the piano, and the watch last of all.

But although specific legacies have the advantage of being used last to satisfy creditors, they have **one great disadvantage**. Suppose that before his death the testator had sold his black mare, or given it away, the legacy of that black mare comes to naught. Again, if I bequeath my signet ring to my friend Frank Brown, and between the making of the will and my death I sell, give away, or lose the ring, my friend's legacy has gone altogether. This is called the "ademption" of a legacy. I have heard that in such cases the legatee sometimes imagines that as the specific article given to him is non-existent, he can call on the executor to pay its value. But that is not so. The specific legatee gets either his specific article or nothing.



And for the benefit and instruction as well of legatees as of executors, let me say that **a legatee has no right to take his legacy.** I mean that when the testator dies, all his movable and personal property belongs to the executor to begin with. Thus, if he has bequeathed to me his silver cruet-stand, I have no right to take that cruet-stand away, or even to touch it, simply because it is not mine. It is the executor's. For anything we know to the contrary, he may want to sell it to assist in paying debts. The article bequeathed only becomes the property of the legatee when the executor assents to the legacy. An executor assents to a legacy either when he in so many words tells the legatee to take his legacy, or when he hands the article over to the legatee without words. An executor also assents to all specific legacies by paying one or more general legacies. (*See below.*) The reason is, that no general legacy ought to be paid until after the debts are satisfied; and therefore the payment of a general legacy is an intimation to a specific legatee that the debts have been paid or that there is enough in hand to pay them without touching the article left to him.

**General legacies** stand on a very different footing from the class previously treated of. A general legacy is the gift of a sum of money—not a particular sum, *e.g.* "The money standing to my credit in the Post Office Savings Bank," but not a gift of this kind—"I give £100 to John Jones." The effect of such a gift is that after paying debts and handing over specific articles to specific legatees, the executors must pay £100 to John Jones. To do this, they may sell—and indeed must sell, if necessary—the personal or movable property of the deceased. They cannot sell any of the land belonging to the estate to pay legacies, unless the will expressly empowers them to do so.

The third kind of legacy is called **demonstrative.** A demonstrative legacy is half-way between specific and general. It is not the gift of a particular article, but the gift of a sum of money, and the testator points out to his executors the particular fund from which he wishes the legacy to be taken. Thus, "I give to S. S. £30 out of the money standing to my credit in the Post Office Savings Bank," is a demonstrative legacy. Such a gift has all the advantages of a specific legacy without the disadvantages. Thus, if the testator at his death had £30 or more in his savings-bank book, the legacy will be specific. That is, it cannot be touched for the payment of debts until the other funds are exhausted. On the other hand, it may happen that before his death the testator withdrew all his money from the savings bank. Nevertheless, the legacy of £30 remains; but instead of being specific, it becomes general, and is payable, like other general legacies, out of the general fund after the payment of debts.

It very often happens that a testator gives legacies to a greater amount than his estate is able to satisfy. This arises, as a rule, because he under-estimates his liabilities and over-estimates the value of his property. Let me give an illustration of how to deal with such a case. Samuel Smith makes a will saying, "I give my furniture to my daughter Mary; my gold watch and chain to my son John; £1,000 to each of my four children; £20 to my

clerk, William Jones; and £50 to my brother Nathan Smith; and the rest of my property to my eldest son." Thus he leaves £4,070 in general legacies. The estate consists of (besides the furniture and the watch and chain) £5,000 nominal value of Greek bonds, and some miscellaneous effects worth £200. The executors sell the bonds and the miscellaneous effects; but owing to a slump in the market the bonds have gone down to 50; and so the price realised for them is only £2,500. The miscellaneous lot fetches £200. Altogether, £2,700. Duty, testamentary and executors' expenses, and funeral expenses amount to £100. The debts reach £300: leaving £2,300 for distribution. Now the executors must pay all the general legacies in equal proportions. They must not pay one in full unless they can pay all in full; so that it works out in this way:—

Each general legatee gets in the proportion of 2,300 to 4,070. Working this out, the result is:—

Each of the four children receives £565 2 2½—altogether £2,260 8 10

William Jones receives	...	...	...	...	...	11	6	0½
Nathan Smith receives	...	...	...	...	...	28	5	1½
						<hr/>		
						£2,299 19 11½		
						<hr/>		

And the executors can do what they like with the remaining farthing. John; of course, gets his watch and chain, and Mary her furniture; for these are specific legacies.

Now executors of testators who died before 1898 have no power to sell and deal with **the testator's land** unless he has expressly authorised them to do so. And even if the will says, "I give my executors power to sell my land to pay my debts," the executors have no right to sell the land until they have exhausted every other means of satisfying the creditors. The above is called a "charge" of debts on the land. Or the testator may say, "I give my executors power to sell my houses in High Street, Mudville, to pay my debts," and in that case the debts are only "charged" on the particular houses mentioned. Even then, the executors must not sell them until they have exhausted the personal property.

It is slightly different, however, if the testator says, "I give my houses in High Street, Mudville, to my executors to pay my debts." This is more than a charge. It is a trust laid on the executors to sell these houses and pay debts with the proceeds. Even then, the executors do not sell the houses first of all. But executors of **testators who die after 1897** are in a vastly different position. Such executors take the testator's land as well as his other property and deal with it for the benefit of all concerned. That is, they first pay duty [see p. 964] out of it to Government. Then they pay out of it any debts specially payable out of it—e.g. if land is mortgaged the mortgage debt must be paid out of that land. And if there is not enough of personal property to pay the ordinary creditors the executors must sell the land for the purpose.



The order of applying the estate to pay debts is this :—

(1) The residuary personal estate of the deceased. That is, personal estate (*i.e.* not land) which has either not been dealt with by the will or has been left as residue.

(2) Real estate (land) devised for the purpose of paying debts. (*See last example in preceding paragraph.*)

(3) Land not disposed of by will.

(4) General pecuniary legacies, including annuities.

(5) Land "charged" with payment of debts. (*See first example in preceding paragraph.*)

(6) Specific legacies and land devised by the will.

(7) Widow's paraphernalia.

I think I have explained all the matters above, except "paraphernalia." Paraphernalia means those things given by a man to his wife for her personal adornment according to his rank and position—not out-and-out gifts, mark you ; but a sort of "I-give-you-this-to-wear-but-not-to-do-what-you-like-with" present. If the husband dies, these things all go to his widow absolutely, unless he died so poor that they have to be sold to pay debts. But they are always the very last things to be sold.

I may say that a creditor can always get at the land of the deceased by commencing an action in Court ; but the executor cannot sell the land first unless it is either "charged" with debts, or devised to pay debts. The list given above is for the guidance of an executor only, as regards the property under his control. In an administration action the order is rather different.

**After paying debts and legacies** the duty of the executor as such is finished. He ought now to hand over the residue of the property in his hands to the residuary legatee, unless the property is left on trust. In that case he ought to hand everything over to the trustees. Very often, the executors are also trustees ; and if they are, they must invest the money in proper securities, and deal with it according to the directions of the will. But of matters relating to trusts I will deal in the chapter on Trusts and Trustees. I should say that if he is required to do so, an executor should at all reasonable times render to the residuary legatee or legatees, or to the trustees to whom he hands over the balance of the estate, an account of his dealings with the property. This account should be as detailed as possible ; and the wise executor will always, before parting with the balance of the estate, have an interview with and explain the accounts to the person or persons to whom he has to pay the money. He will also request these people to sign the account to show that they accept it as correct.

As to land of persons dying after 1897, the executors ought to have paid the duty and debts (if any) chargeable on it within a year, and must be ready to convey the land at the end of that time to the person named in the will.

An interesting question is, **how far an executor is liable for his co-executors.** The rule is, that an executor is only personally liable to the extent of the funds that have come into his hands. Thus, if A and B are

executors, and a debtor to the estate pays a debt of £1,000 to A, and A misappropriates it, B is in no way answerable. But to this rule there is the inevitable exception. It amounts to this: Every executor ought to have his eyes open, and ought not to allow any part of the estate to remain for any length of time out of his control. The safest plan is for all moneys to be paid into a bank in the joint names of all the executors, so that none can be drawn out by one without the knowledge and consent of the other. And every executor should insist on all money received by a co-executor being paid immediately into the joint account. To omit this elementary precaution is a breach of trust for which an executor is liable if harm comes of it. If it were not so, testators might as well appoint one executor as two; for the value of appointing two persons is partly that one may keep an eye on the other. Personally, I would refuse to act as sole executor unless I were also sole legatee. And if my best friend were co-executor with me, I would not allow him to retain money under his own control for twenty-four hours.



## CHAPTER III.

### DIVISION OF PROPERTY WHEN NO WILL IS MADE.

History of the matter—Difference between land and other property—"Primogeniture"—Does not apply to personal property—Administrator or executor-dative must be appointed—Duties similar to those of executor—Who has the right to be appointed—Next-of-kin—Widow—Difference between Scots and English law—Wishes of majority to be considered—Creditor, when appointed—How to become administrator—"Letters of administration"—After paying debts, etc., the next-of-kin are entitled to the surplus—Who are the next-of-kin—Children and issue first—"Representation" of parents—English rules as to personal estate—Father next after children—Mother counted as sister—Brothers and sisters and grandparents—Brothers' and sisters' children—How to count degrees of kinship—Half-blood relations—Scottish rules as to movables—Widow's part—Bairns' part—Descendants have first claim—Father and mother's share—Brothers and sisters and their children—Half-blood relations—Real and heritable property—England—What is real property—Entails—Who is the heir—No equal distribution of land—Eldest male and his line preferred—Father's side preferred before mother's—Half-blood relations—Scotland—What is heritable property—Issue first—Brothers and sisters, nephews and nieces next—Father next—Then uncles and aunts and cousins—Male line preferred—Mother's family never supply an heir—An heir who is also a next-of-kin must bring the inheritance into account—Not so in England—Advances to children in both countries must be accounted for—What are advances.

**W**HEN one dies intestate, *i.e.* leaving no will, the first thing to be done is to appoint someone to administer his effects—to take the same position, in fact, as would have been taken by the executor had the deceased appointed one by will. In ancient times the Church took charge of the personal (movable) property of such as died intestate. The bishop of the diocese took possession, and, after deducting for the Church's benefit the amount he supposed the dead man would have left to the Church had he made a will, admitted the widow or one of the relatives to administer the balance. This jurisdiction has long been obsolete; but it continued long enough to enable the ecclesiastics to impress on the law of intestate succession a distinct character. The churchmen were generally learned in the Civil Law of the Roman Empire, which they regarded as something greatly superior to the customs of those semi-barbaric tribes and nations which formed the common law of the kingdoms of Europe. And, accordingly, in deciding questions relative to the succession to movable property, they applied the rules of the Roman Law.

On the other hand, succession to landed property—"lands, tenements, and hereditaments," as the English lawyers have it, and "heritable" property, as Scots lawyers say—was never in any way subject to the jurisdiction of the

Church. In Western Europe land became subject, at an early date, to a system called the feudal system. The feudal system had its origin in the invasion and conquest of the Roman Empire by the Goths, the Vandals, the Normans, and the other hordes of barbarians who obtained dominion in Western and Southern and Middle Europe between the third and the ninth centuries. As the land was conquered, the victorious general and chief granted it out to his bravest warriors upon condition that they should help him against all his enemies. There is no reason to believe that the early feudal grant of land was anything more than for the life of the warrior to whom the gift was made. The king or lord reserved to himself the power of disposition when the tenant died. But the landholders gradually began to take advantage of the king's necessities to secure to their posterity the benefit of the royal grant.

As far as is known, the first introducer of hereditary "fiefs," as these feudal grants were called, was Louis I. of France, surnamed Le Débonnaire, who sat on the throne of France from 814 to 840. This prince, though amiable, was weak, and allowed his great vassals to extort from him charters continuing their fiefs in their families. Now, as most fiefs were held on condition of rendering military service when required, it became politic to keep the inheritance in the male line as much as possible. Hence we have the law which remains to the present day, that in the succession to land, males are preferred before females in the same degree. That is, when you have a male and a female both equally near in blood to the deceased, the male takes all the inheritance, and the female nothing. Again, family pride favoured the notion of keeping all the inheritance in one pair of hands, because one man with three castles, five thousand acres, and five hundred vassals was more powerful than three men with one castle and less than two thousand acres and two hundred men each. And so the custom grew into law that of the men equally near in blood to the deceased lord, the eldest should be the sole heir. Such is, briefly, the history of primogeniture.

Now, the bishops who watched over the distribution of the movable, personal effects of our ancestors were not troubled by feudal considerations, nor did the feudal lords take the trouble to interfere with them, for the simple reason that it was not worth while. In those early days property other than land was accounted of little value. Money was scarce; and other movable articles were worth comparatively little. And these good bishops, finding in the Roman Law a ready-made code, applied it *en bloc*; and fortunately for women and younger sons, the Roman Law made no distinction between males and females, between older and younger. It merely shared the inheritance between the persons most nearly related to the deceased.

Another result of the motherly control of the Church over personal and movable property was that before the creditors or relatives could deal with it, they had to obtain the leave of the bishop of the diocese. For unless somebody made a claim, the Church kept everything, and applied it for the benefit of the deceased by devoting it to pious uses for the good of his soul. As to land (real or heritable property), the heir entered of his own right as



soon as his ancestor died. But no one could touch the goods, chattels, and money until he had been authorised to do so by the bishop. This distinction still prevails in Scotland. Nobody can touch the personal (movable) property of the deceased except the person appointed by the Court. This may be either the executor nominated in the will of the deceased (who obtains probate or confirmation), or a person chosen by the Court when no executor is so nominated. But he who inherits land, or to whom land is given by will, enters into his heritage at once, without permission from the Court or any other person. In England, the same distinction prevailed before 1898; but by the Land Transfer Act, 1897, which came into operation on the 1st of January, 1898, and applies to the estates of all persons dying on or after that date, the executor or administrator takes possession of the land as well as the personal property, and only hands it over to the heir or devisee when debts and Government duty have been paid.

The first thing to be done when the deceased dies intestate is to obtain the **appointment of an administrator (or executor-dative)** to wind up his affairs, pay his debts and funeral expenses, and distribute the balance of his personal (movable) estate amongst those entitled to it. As you see, this person [called "administrator" in England, and "executor-dative" in Scotland] has precisely the same functions as an executor named in a will, except that when he has satisfied the debts, he has no will to guide him in the distribution of the balance of the property.

**The duties of administrators.**—All the rules laid down in the last chapter for the guidance of executors apply equally to administrators and executors-dative, as to the getting-in and realisation of the property of the deceased, the payment of debts and funeral expenses, and so on. It is only in distributing the surplus after paying debts, funeral expenses, and Government duty that the duties of an administrator differ from those of an executor. For while the executor has to distribute the surplus according to the deceased's will, the administrator has to go by the law and ascertain the next-of-kin.

**Who should apply to be appointed administrator or executor-dative, and how should the application be made?**

**In England,** the practice rests on two very old Statutes—one of Edward III. and one of Henry VII. If the deceased is a married man, his **widow** has the first and best right to administer his personal estate. She can only be set aside when there is some circumstance rendering her, in the opinion of the Court of Probate, an obviously improper person. For example, when she is living apart from her husband and has been unfaithful to him. But the mere fact that she has married again since the decease of the first husband does not disentitle her from being his administrator. If there is no widow, or if she does not wish to act, or if the next-of-kin consider her, for some grave reason, an improper person, **one of the next-of-kin** has the right to be appointed. Even when there is a widow, the Court will sometimes appoint one of the next-of-kin to act with her, especially when that next-of-kin is a very near relative—*e.g.* a son, a father, or a brother. The order in which the next-of-kin may apply for letters of administration is as follows:—

- (1) Child of the deceased.
- (2) Grandchild „ „
- (3) Great-grandchild „
- (4) Father.
- (5) Mother.
- (6) Brother or sister.
- (7) Grandfather or grandmother (whether on father's or mother's side).
- (8) Nephew, niece, uncle, aunt, great-grandfather, or great-grandmother.
- (9) Great-nephew or great-niece.

What I mean by calling this the order in which next-of-kin may apply is, that if no person in class 1 (*i.e.* a child) applies soon after the death, a member of class 2 (*i.e.* a grandchild) may ask to be made administrator. If there are no children or grandchildren, or none apply, the great-grandchildren. And so on in the order given.

“But,” you will say, “a man may have many children, or many grandchildren. He may have half a dozen brothers and sisters. Do they all become administrators?” Certainly not. More than one may apply together—that is, may make a joint request that they shall be made co-administrators. But such applications are not viewed with favour. Now, suppose a man dies without a widow, or children, or grandchildren, and his father and mother have predeceased him. But he has three brothers and three sisters who survive him. The administration will be conferred upon a brother rather than a sister, because if a man makes default in his accounts, you can get at him better than you can get at a married woman—and the sisters are either all married or are (on general principles) intending to be. But which of the brothers? Well, if a majority of the next-of-kin prefer any one of the three, that one will be appointed in preference to one only approved of by the minority. Thus, if the three sisters would like their brother Tom to be administrator, and Tom is willing to act, the four of them constitute a majority, and will be entitled to have Tom appointed, though he may be the youngest of the three brothers, and one of the elder ones puts in a rival claim. It may, however, happen that the eldest brother, John, applies to be appointed, and Tom also applies. The other four are equally divided in their suffrages, or else remain neutral. In that case, the one who first applied will be appointed.

These rules always apply: namely, where there are several persons in the same class, a male of that class will be preferred before a female. But the whole of the next-of-kin are entitled to be consulted, and the wish of the majority must prevail unless the minority are prepared to go to the expense of a lawsuit to prove that the nominee of the majority is an untrustworthy and improper person. Subject to this right of the majority, it is first come first served.

It may happen that no one of the next-of-kin is willing to undertake the burden of the office. This usually happens when the deceased has left behind him more debts than wealth. Now such an event is rather a serious matter for creditors; for until an administrator is appointed there is nobody



with any legal right to realise such property as there may be, and pay the debts of the deceased. And so the law allows a **creditor to be appointed administrator** in default of anybody else. A creditor administrator is not regarded with very great favour, and will only be appointed to the office when no next-of-kin can be found willing to undertake the task. Moreover, such an administrator, being only appointed in order that creditors may not suffer loss, will have to give an undertaking to distribute the property amongst all creditors *pro rata*. I have told you in the last chapter (p. 963) that if an executor pleases, he may pay the debts without regard to the fact that he pays the whole amount to one man and leaves nothing for anyone else. An administrator has the same right. Thus, if the deceased owed £50 to Jones and £100 to Robinson, and the administrator has only £55 left after paying funeral expenses and the expense of obtaining administration, he can pay Jones's debt in full and leave only £5 for Robinson. But an administrator-creditor is not allowed to do this; he will have to share the £55 proportionately between Jones and Robinson—seven-and-fourpence in the £ each.

If two or more creditors seek the office, the largest creditor has the preference.

The way of getting appointed administrator is by taking out letters of administration either in the Probate Registry of the district where the deceased resided, or in the Principal Registry in London—the same place as that in which an executor obtains probate of a will (*see* p. 956). When the widow applies, she is appointed as a matter of course, unless there is notice of opposition. When one of the next-of-kin applies, he ought to give notice to all the other next-of-kin in the same class as himself of his intention to apply; for the Registrar will demand proof that such notice has been given before he will seal the letters of administration. Or else the applicant must be able to give some good reason why he did not notify the other next-of-kin—for instance, that they reside abroad, or that he does not know where to find them. This is because the other next-of-kin in the same class have a right to be consulted in the appointment of the administrator. Therefore it would not be just to appoint someone behind their backs.

The **letters of administration**, bearing the seal of the Probate Division of the High Court of Justice, form the title-deed of the administrator to act. They entitle him to be treated as the representative of the deceased, and to make claims and sue on behalf of the estate. As to persons dying before 1898, the administrator has no right to real property—only to what is called personal. The difference is pointed out on page 985. Suffice it here to say that the administrator must not meddle with the freehold land of the deceased. He must get in all debts, realise the goods, chattels, and securities for money, stocks and shares, business and goodwill; and out of the proceeds pay, first, all funeral expenses, next, his own expenses in administering the estate, and then the debts in the order of priority given on page 963. He can retain a debt due to himself, just as an executor can (p. 964), unless he is a creditor-administrator. Thus, if after paying funeral expenses and the Crown

debts, rates, and taxes, judgment debts, and all other kinds of debts due to creditors of a higher class than himself, there is £100 left, and the deceased owed him £60, he can keep the £60, and pay the other £40 to other creditors.

As to persons dying on and after January 1st, 1898, the administrator takes charge of the real estate also; but practically this is only so that he can see to the payment of estate duty on all the property of the deceased. The administrator holds the land for a year, and after seeing that duty is paid, and that the debts to which the land is liable have been paid or satisfied out of it, he conveys it at the end of that time to the heir at law.

In Scotland the rules are much the same as in England. There, in early days, the Church looked after the movable property of the dead. The jurisdiction was abolished at the Reformation; but the ecclesiastics had stamped the Roman character on the law in the same way as in England—and even more so. For in Scotland the doctrine of the Roman Law that a man cannot wholly disinherit his children (p. 56) was imported—a doctrine that the English would not suffer.

An executor named in the will of the deceased is called in Scotland an “executor-nominate.” If there is no executor-nominate, you must go to the Commissary Court of the county and ask for the appointment of an “executor-dative”—a term borrowed from Roman Law and signifying an executor “given” or nominated by the Court. It is the duty of the executor-dative to make an inventory of the deceased’s goods, effects, and property, to pay Government duty, to wait for six months so as to get in all claims against the estate, and then to pay whatever is owing (*see* preceding Chapter).

**Who is appointed?**—The same people who have the right to apply in England to be appointed administrators have the right to be made executors-dative in Scotland—that is, the **widow** and the **next-of-kin**. But while the English law, in case of dispute, gives the preference to the widow, the Scots law gives it to the next-of-kin. Again, in Scotland a **creditor** may be appointed executor-dative, in order to enable him to recover his debts—and if no widow or next-of-kin applies. But the Scottish executor creditor should only ask to be appointed administrator of so much of the dead’s means as will suffice to pay his own debt—while the English administrator-creditor must administer the whole estate.

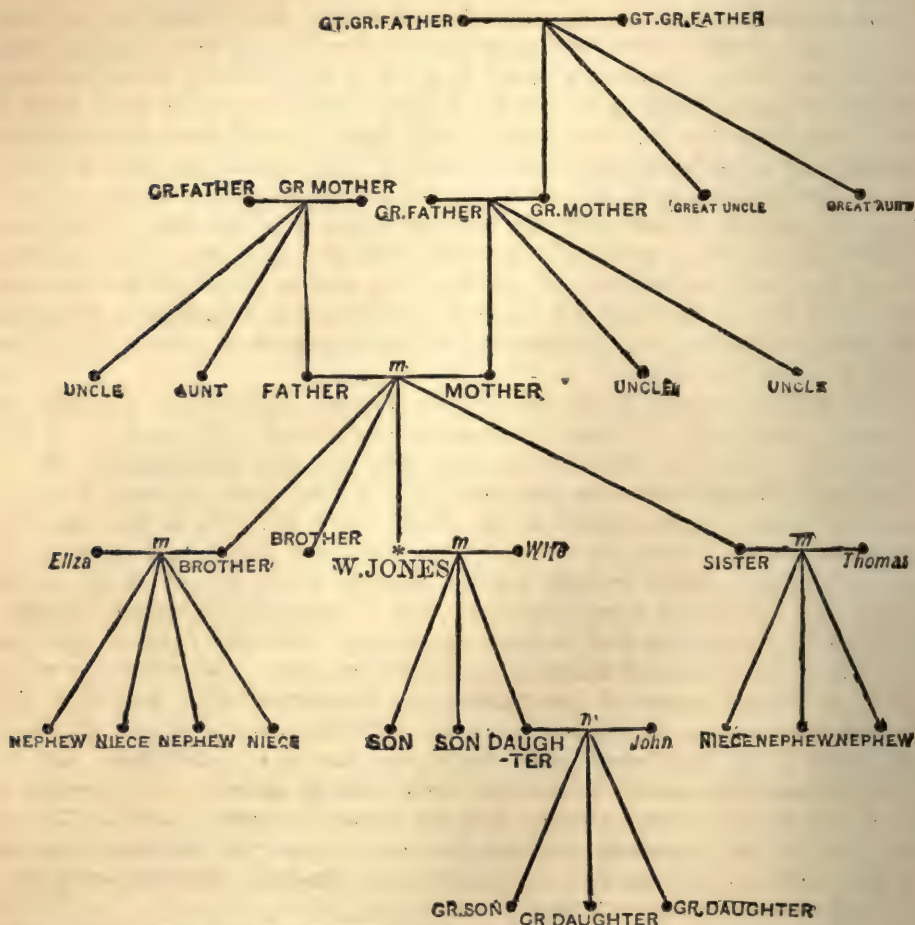
The **next-of-kin** are entitled to the surplus of the estate after payment of funeral expenses, the expenses of administration, and the debts of the deceased.

**Who are the next-of-kin?**—The following chart shows how to answer the question. William Jones is the deceased; and you want to find his next-of-kin (*d*, *dead*; *m*, *married*). In this and all the other charts (except the “Puzzle Chart”) the persons in the same degree of kinship are printed in the same-sized type; and the nearer the degree the larger the type. Thus: father, mother, sons, and daughters are equal, being all in the first degree; grandfathers, grandmothers, grand-children, brothers and sisters come next, and come together, being all in the second degree; great-grandparents are in the third degree along with



nephews and nieces; and great-aunts and great-uncles are in the fourth degree. When the name is in *italics* that person cannot take anything.

Chart of next of Kin.

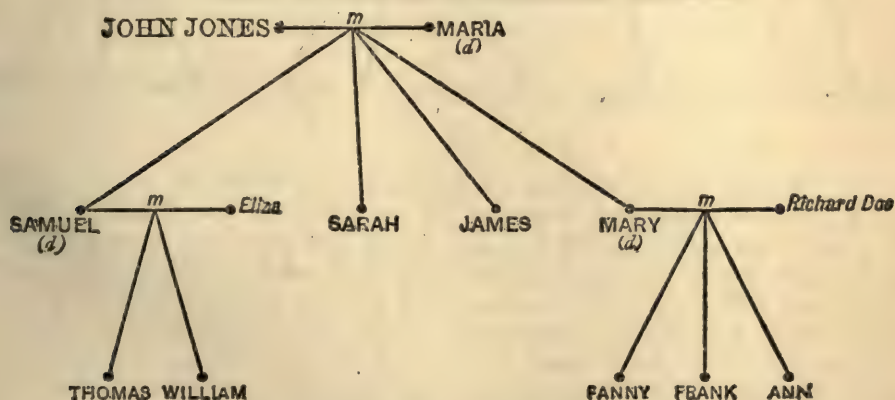


The rule is that the next-of-kin of the same degree take equally amongst them after deducting the widow's share, if the deceased left a widow. What her share is depends on whether there are children or issue surviving. The word *issue* means descendants—children, grandchildren, great-grandchildren, and so on to infinity. When there are no issue, the widow takes one £500, charged rateably upon the real and personal property, and half the remaining personal property. When there is issue, the widow merely gets one-third of the personal property and no £500. The other two-thirds go to the issue. And the issue always are preferred before other next-of-kin, even of the same degree. Thus, my father and mother are of exactly the same degree of kin to

me as my children, and are nearer than my grandchildren. But my children and grandchildren are preferred before my father and mother. Again, my grandparents are in the same degree of relationship to me as my grandchildren, and one degree nearer than my great-grandchildren. But the grandchildren and great-grandchildren are preferred before grandparents or even parents.

Another peculiarity with regard to issue is that if the parents of any of my issue are dead, leaving children, those children are not excluded merely because I leave other issue of a higher degree. To take an example, I have four children; two of them die before me; one of them had two children, and the other three. On my death intestate, the children of my deceased children step into their parents' places; that is to say, the personal property is divided into four shares; one share goes to each of my surviving children, while the other parts go—one to the two children of one deceased child, and the other to the three children of the other deceased child. Let us look at this by the aid of a chart and a table. John Jones is the deceased intestate whose property is to be divided (*m*, married; *d*, dead).

Chart of Shares of Intestate's Children.



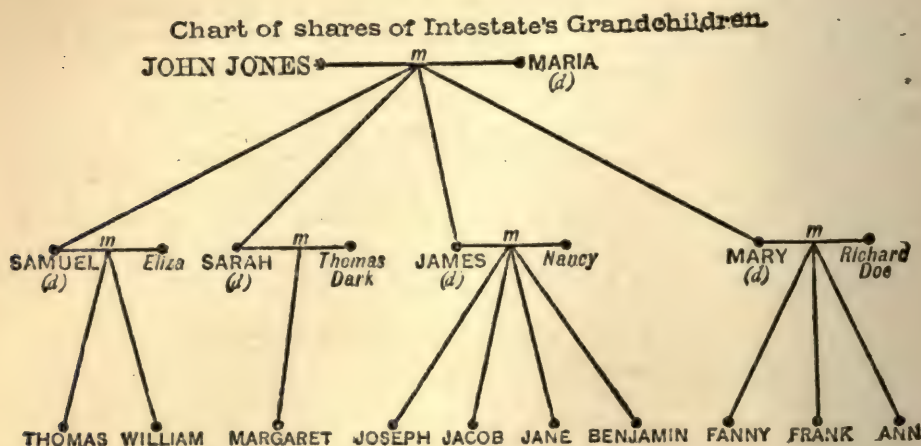
You see that if the issue of John Jones who were his next-of-kin were to take the property, it would all fall to Sarah and James, for they are the only two surviving in the first degree. But the two children of Samuel step up and take their father's share between them; and Mary's three take their mother's share.

*The personal property consists of £750. Division:—*

Sarah Jones (one-fourth) ... ..	£187 10 0
James Jones (one-fourth) ... ..	187 10 0
Thomas Jones (one-half of one-fourth) }	(Samuel's share) { 93 15 0
William Jones ( " " ) }	
Fanny Doe (one-third of one-fourth) }	(Mary's share) { 62 10 0
Frank Doe ( " " ) }	
Ann Doe ( " " ) }	
	<u>£750 0 0</u>



Now, if all John Jones's children are dead, you do not divide the property into as many shares as there were children, and give one share to each lot of grandchildren. You merely divide it equally amongst all the grandchildren. Let me illustrate the point by another diagram.

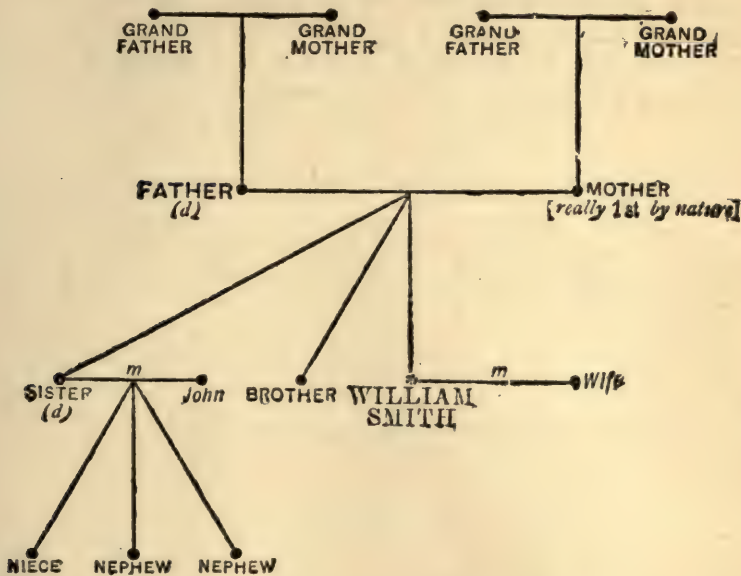


You see that all the children of John Jones are dead. So you go on to the grandchildren and find that they are all living, to the number of ten. You divide the estate (£750) into ten shares, and give £75 to each grandchild. Had one of the grandchildren been dead, leaving children, you would have given that £75 equally amongst the children of that deceased grandchild. Thus, had Thomas been dead, leaving three children, Isaac, Rachel, and Rebecca, these three would be entitled to £25 apiece. This plan, by which the children of a deceased child step into their parents' shoes, is called "representation"—the children are said to represent their parents.

When there are no issue living, after deducting the widow's portion, the father of the deceased is entitled to everything, for he is only one degree removed from the deceased. The mother is also in the first degree, for she, of course, is just as nearly related as the father. But an ancient Statute of James II. deprives her of her natural right and classes her along with the brothers and sisters of the deceased; in other words, she is deposed from the first degree and put into the second. The relations in the second degree are grandparents, mother, brothers and sisters. Now, children of a brother or sister (*i.e.* the nephews and nieces of the deceased) are in the third degree. Consequently, if you have two brothers, and one of them dies, leaving children, the brother would exclude the nephews and nieces, because he is one degree ahead of them. But by Statute, when my relations in the second degree [grandparents, mother, brother, or sister] are living, and there are also nephews or nieces, children of a deceased brother or sister, the nephews or

nieces step into their parents' shoes. Take the following instance: William Smith dies, leaving a widow but no children. The diagram shows his kin:—

Chart of succession in the second degree.



There are a brother, four grandparents, and the mother—all in the second degree. The two nephews and the niece take one share—that of their deceased mother. Then there is the widow.

Property = £800.

Widow takes £500 and one-half ... ..	=	£650 0 0
Brother „ one-seventh of £150 ... ..	=	21 8 6
Grandparents take one-seventh each of £150	=	
£21 8s. 6d. each... ..	=	85 14 0
Mother takes one-seventh of £150 ... ..	=	21 8 6
Nephews and niece take one-seventh between them of £150 = £7 2s. 10d. each ... ..	=	21 8 6
		<hr/>
		£799 19 6

And 6d. over by reason of the fractions.

I wish you to observe that **nieces and nephews** do not “represent” their deceased parents unless for the purpose of preventing themselves from being crowded out. In the above illustration, the niece and nephews would take nothing—being in degree three—unless they were allowed to “represent” their dead mother. But suppose the intestate has no kin in the second degree, and has nephews and nieces, the nephews and nieces do not take by





uncle), and a great-uncle (child of deceased great-grandfather), all in the fourth degree. Now, these last-mentioned relatives do not get anything. The third degree are entitled to the whole in equal shares.

**The way to count degrees of kinship** is to go up to the common ancestor, each step counting as one degree, and then down to the relative in question, each step down counting another degree. Thus, from William Smith up to his father is one; from father up to grandfather is two; then from grandfather down to uncle is three; and from uncle down to cousin is four. You see your father is the connecting link between you and your brother, your grandfather between you and your uncle.

Next-of-kin (excluding issue, who take under different rules) in the various degrees are these:—

*In the first degree:* Father.

*In the second degree:* Grandparents, mother (by Statute), brothers and sisters.

*Note:* If any of the above are living, the children of a deceased brother or sister come in in families (*see pp. 978–9*).

*In the third degree:* Great-grandparents, uncles, aunts, nephews, nieces.

*In the fourth degree:* Great-great-grandparents, great-uncles, great-aunts, cousins, and great-nephews.

*In the fifth degree:* The children of great-uncles and great-aunts, the children of cousins, and of great-nephews and great-nieces.

*In the sixth degree:* The children of those in the fifth degree.

And so on, to any degree.

Kindred related by the **half-blood** take an equal share of personal estate with those related by the whole blood. Suppose Mary Jones marries first John Smith, and has by him three sons—Thomas, William, and James Smith. Her husband dying, she marries again; and by her second husband, Samuel Robertson, she has a son and a daughter—Richard and Eliza. A son of the first marriage, Thomas, dies without children or other issue. His next-of-kin are his mother, his two brothers, and his half-brother and half-sister. The five of them take equal shares of his personal property.

#### IN SCOTLAND

the rules for distribution of movable estate amongst the next-of-kin are different from the English rules. In the first place, when the deceased leaves a *widow and children or issue*, the inheritance is divided into three parts, of which one goes to the widow, another belongs to the children, under the name of legitim or bairns' part, and the remaining third, called "the dead's part," is distributed amongst the next-of-kin. Naturally, children will be next-of-kin; and if all the children of the deceased survive him, it will simply mean that they will all share equally in this remaining third. But suppose a child has died, his children will take his share of the "dead's" part, though not his share of the bairns' part. For example: Alexander Macgregor dies, leaving three children—John, Gregor, and Flora. He had also a son Robert, but Robert, after marrying and having three children, dies



before his father, Alexander. This is how the movable property will be divided :—

Movable property worth £3,000 after paying debts.

Widow (one-third) ... ..	£1,000	0	0
--------------------------	--------	---	---

*Bairns' part, £1,000.*

John ... ..	333	6	8
Gregor ... ..	333	6	8
Flora ... ..	333	6	8

*Dead's part, £1,000.*

John .. ..	250	0	0
Gregor.. ..	250	0	0
Flora ... ..	250	0	0

Robert's children (one-third each of £250):

Jean ... ..	£83	6	8
Thomas ... ..	83	6	8
Helen ... ..	83	6	8

---

250 0 0

---

£3,000 0 0

---

You see, it is only children who take a share of bairns' part, not descendants who are more remote than children. The law of Scotland has always been that **descendants are always preferred** before any other kind of kindred. For example, my father is just as near to me in degree as my son, and nearer than my grandson or great-grandson. Nevertheless, my father would not succeed to any of my property so long as I left behind any children, grandchildren, or even more remote descendants. But until 1855 the law of Scotland did not regard the principle of representation (p. 977). That is, if a man had living at his death two children and some grandchildren by a deceased son or daughter, these grandchildren got nothing. By a Statute of 1855, however, they now take amongst them the share that their parent would have taken had he or she been living—except the share of bairns' part. For illustration see the case of Alexander Macgregor above. The principle now applies to all issue of a man who dies without a will. Thus, James Macpherson when he dies has no children living. He had, however, four children—Mary, Margaret, Alexander, and Neil. These all married.

Mary had children—Pherson, Charles, Jessie, and Kate.

Margaret had two children—Alister and Dugald.

Alexander had one child—Alan.

Neil had three children—Donald, David, and Jean.

Thus James Macpherson had ten grandchildren. But of these his grandson Donald died leaving two children—Henry and Alice.

Jessie also died leaving three children—Angus, Robert, and Barbara.

The property is divided as follows :—

*Movable property realises £1,000, clear.*

There is no widow.

Daughter Mary's descendants	{	Pherson	...	...	...	...	£100	0	0		
		Charles	...	...	...	...	100	0	0		
		Jessie's share to her children, viz. :									
		Angus	...	...	£33	6	8	}	100	0	0
		Robert	...	...	33	6	8				
Daughter Margaret's descendants	{	Barbara	...	...	33	6	8				
		Kate	...	...	...	...	...	100	0	0	
		Alister	...	...	...	...	...	100	0	0	
		Dugald	...	...	...	...	...	100	0	0	
		Alexander's child	{	Alan	...	...	...	...	100	0	0
Donald's share to his children, viz. :											
Henry	...	...		...	£50	}	100	0	0		
Alice	...	...		...	50						
David	...	...		...	...	...	100	0	0		
Jean...	...	...	...	...	...	100	0	0			
Total =							£1,000	0	0		

When there are **no children or other descendants**, the widow takes half instead of one-third. Then you inquire whether the deceased had a **father** living. If so, the father takes one-half of the movables [not, as in England, the whole]. If the father is dead, you inquire for the **mother**, and she will take one-third of the movables. Next to the parents—or after deducting their shares—come **brothers and sisters and their descendants**—*i.e.* the nephews and nieces (or their children). Brothers and sisters, if they had the same father as the deceased, rank equally; but if they had only the same mother they take nothing if the father or mother is still living; or if there are any other brothers and sisters living; but if father, mother, and all the dead's brothers and sisters by the same father are dead, then the brothers and sisters by the same mother take half the movables, and the others go to the other next-of-kin.

#### ILLUSTRATION I.

Mary Grey marries (1) John M'Dougall.  
Children—Dugald, **Angus**, and Jean M'Dougall.  
John M'Dougall dies.

Mary Grey marries (2) Alexander Macgregor.  
Children—Jessie and Alan Macgregor.



Angus M'Dougall dies leaving £500 in the bank. He was never married.

His mother takes  $\frac{1}{3}$  ... .. = £166 13 4

His brother Dugald and sister Jean divide the rest

= £333 6 8 :

= Dugald ... .. = 166 13 4

= Jean ... .. = 166 13 4

£500 0 0

The half-brother and sister take nothing.

#### ILLUSTRATION II.

John M'Dougall marries (1) Mary Grey.

Children—Dugald, Angus, and Jean M'Dougall.

Wife dies, and

John M'Dougall marries (2) Margaret Balfour.

Children—Charles and James M'Dougall.

John M'Dougall dies.

The widow Margaret Balfour (or M'Dougall) marries (2) Alexander Macgregor.

Children—Jessie and Alan Macgregor.

Charles M'Dougall dies, leaving £500 in the bank. He was never married.

#### *Distribution.*

Margaret (his mother) takes  $\frac{1}{3}$  ... .. = £166 13 4

Leaving to be divided amongst next-of-kin = 333 6 8

James M'Dougall (Charles's whole brother) takes  $\frac{1}{4}$  = 83 6 8

Dugald M'Dougall (half-brother) ... .. = 83 6 8

Angus M'Dougall ( " " ) ... .. = 83 6 8

Jean M'Dougall (half-sister) ... .. = 83 6 8

£333 6 8

Jessie and Alan Macgregor, the half-brother and sister on the mother's side, take nothing.

#### ILLUSTRATION III.

Mary Grey marries (1) John M'Dougall.

Child—Angus.

John M'Dougall dies.

Mary Grey (or M'Dougall) marries (2) Alexander Macgregor.

Children—Jessie and Alan Macgregor.

Angus M'Dougall dies, leaving £500 in the bank. He was never married.

#### *Distribution.*

His mother takes  $\frac{1}{3}$  ... .. = £166 13 4

The other £333 6s. 8d. goes to the next-of-kin—e.g. Angus's father's brothers or sisters. Jessie and Alan Macgregor take nothing.

## ILLUSTRATION IV.

Mary Grey marries (1) John M'Dougall.

Child—**Angus**.

John M'Dougall dies.

Mary Grey (or M'Dougall) marries (2) Alexander Macgregor.

Children—**Jessie and Alan Macgregor**.

Alexander Macgregor dies. Then Mrs. Mary Grey (or Macgregor) dies.

Then Angus M'Dougall dies, leaving £500. He was never married.

*Distribution.*

Jessie and Alan Macgregor take  $\frac{1}{2}$  (£166 13 4)  
between them, viz :

Jessie Macgregor	...	...	...	...	£88	6	8
Alan Macgregor	...	...	...	...	88	6	8

The other two-thirds goes amongst other next-of-kin—*e.g.* the brothers and sisters of Angus M'Dougall's father.

After brothers and sisters and their children, the father's collaterals—*i.e.* the deceased's uncles and aunts—take share, and so on according to degrees.

REAL PROPERTY (*England*)—HERITABLE PROPERTY (*Scotland*).

The only thing remaining for consideration is the succession to landed property. *In England*, property is divided into (a) Real and (b) Personal. And the rule is that on an intestacy the Real property descends to the heir, while the Personal property goes to the next-of-kin as before stated. **What is Real property**, and why is it so called? Legal historians tell us that in the early state of the law a freeholder who was wrongfully turned out or kept out of his land could bring the wrongdoer before the King's Court, and obtain a decree by which the rightful owner was put in possession of his land again. If the wrongdoer would not yield up possession peacefully he was turned out by the sheriff—the king's representative in the county. This kind of action was called a "real" action, from *res* (Latin, the thing), because the rightful owner recovered the actual thing about which the action was brought. But when a man was wrongfully deprived of his goods and chattels—his furniture, his horse, his weapons—he could only bring an action to compel the wrongdoer to pay him as compensation the value of the thing. That is, his judgment was not to recover the thing, but a sum of money payable by his adversary personally. Now an action merely for damages is called "Personal." By reason of these facts, lawyers applied the term "Real" property to property which was the subject of a real action, and "Personal" to all other property. Hence, in England an interest in land for less than a life was personal property, and is to this day; because if a man who was a yearly tenant (or less), or even a tenant on a long lease, was turned out of possession of the land, he could not claim



to be put in possession again, but only claim damages from him who turned him out.

So that land is real property, except leaseholds. Thus if I hire land on a building lease for ninety-nine years, and die intestate, the lease goes to my administrator as part of my personal estate, and it will have to be sold and the proceeds divided amongst my next-of-kin (*see* last section). So also if I am a yearly tenant (or less). My tenancy devolves on my administrator. He is liable to the landlord for the rent, and he must give notice to quit. It is only freehold estates of inheritance in land which devolves upon the heir. Copyholds go to the heir by the custom of the manor.

The English law knows **two kinds of estates of inheritance**. The first is called a "fee simple," the second is known as an "estate tail." A **fee simple** is when the deed or will by which the deceased became entitled to the land states that he is to hold the land "to him and his heirs" or "in fee simple." In a will, the word "absolutely" is enough to bestow an estate in fee simple; or if the testator says "I give my land [describing it] to John Smith," John Smith becomes the owner in fee simple, unless the will in some other place cuts the gift short.

Now a fee simple is the largest kind of ownership known to the law, both because the owner can deal with it practically in any way he pleases, and because if he dies intestate his "heirs" take. Now "heirs" is a very wide word. It is not confined to children only, or grandchildren, or descendants.

And in this respect the fee simple differs from an **entailed estate**. An entailed estate is when the succession is limited to the "heirs of the body" of a particular person. Thus, if I have land and I give it to "Smith and the heirs of his body" (or "Smith in tail," which is the same thing), and Smith dies, the land can only go to an heir who descends from Smith. Thus his children can take the land, or his grandchildren, or great-grandchildren; but if Smith dies without leaving any descendants surviving him, there is no one to inherit his land. See how different this is from a fee simple. If Smith's estate had been "to Smith and his heirs" (or "to Smith in fee simple"), and Smith had died without ever having had children, there would almost certainly be an heir of Smith somewhere to be found—his father, brothers, sisters, mother, grandfather, uncles. For my uncle may be my "heir," though he cannot be "the heir of my body."

Again, in the case of entailed estates, the owner cannot make a will of them; nor can he dispose of them in his lifetime so long as they remain entailed. I have heard a great deal of eloquent invective against entails. Many people think that when land is once entailed it is tied up for ever, or nearly that. But this is a **popular error**. In England, nothing is easier than to take the entail off land. As soon as the owner of an estate in tail is in possession of the land, and is of age, he can take away the entail whenever he likes, turn his land into a fee simple, and have the absolute free disposal of it. And if the owner of entailed estates becomes bankrupt, his trustee in bankruptcy can remove the entail and sell the land to pay the

creditors. The process merely consists of a deed made by the owner, declaring his intention to free the land from the shackles of the entail; and this deed must be filed in the Central Office of the High Court. So that nobody need remain fettered by an entail for twenty-four hours.

I should add that when a man is in possession of land, the law presumes that he is the owner of it in fee simple, unless the contrary is proved; except in the county of Kent, where they have a peculiar system of land tenure called "gavelkind."

I have shown on page 33 that when a married man dies intestate, his widow takes one-third of the lands for life (not leaseholds, but freeholds only)—which third is called her "dower." I have also shown that when a family man dies, his eldest son is the heir of his freehold lands—and if that son is dead, leaving children, then his children (or if they are all dead, their children) take his place (p. 55).

**How to find the heir.**—But the owner of land does not always leave children or grandchildren to inherit. What you do then is to go upwards and across, or collaterally. You go up to the ascendants or ancestors of the deceased; and if any of them are dead, their children or issue represent them. You take the ancestors on the father's side first, and their children—*i.e.* the father, brothers and sisters; paternal grandfather, grandmother, uncles, aunts, and cousins; paternal great-grandfather, great-uncles, etc.; and only when you have exhausted the paternal line do you begin on the maternal. In other words, if you cannot find any relative on the father's side, you begin to inquire about the mother's relatives. Suppose one has no father, brothers, or sisters, paternal grandfather, etc. (*see* above), the mother comes next; and if she be dead, then her father, brothers, sisters, and so on.

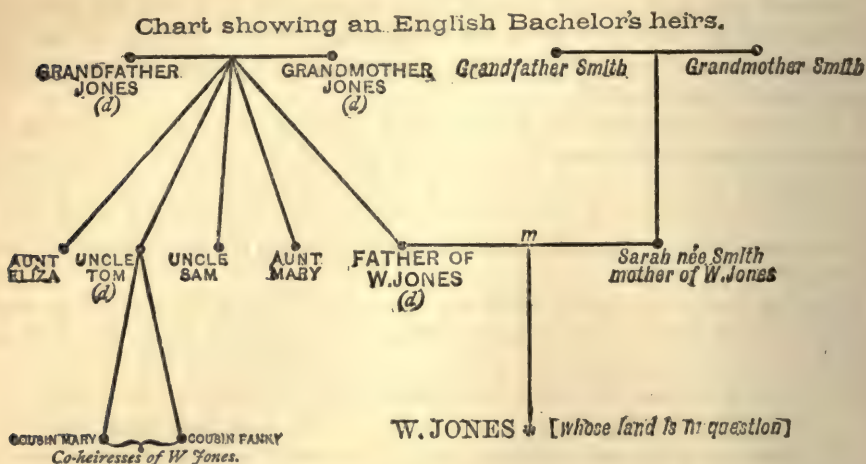
The next rule is that if there are several persons in the same degree of relationship to the deceased, males take the inheritance in preference to females. And of these males the eldest is preferred. But if the nearest persons are females, they all take together—*i.e.* an elder female has no preference before a younger. For instance: Jones is a bachelor and an orphan. He buys a bit of freehold land and then dies. If he has a grandfather, that gentleman is the heir. If not, [you ask if he has any uncles or aunts on his father's side. You find that Jones has five persons in that degree of relationship, the two brothers and three sisters of his late father, living. You can leave out the three aunts, and the whole of the land goes to the elder of the two uncles. Suppose the elder of the two uncles is dead, leaving a child or [children, the latter take their father's place—that is, the eldest son of the eldest uncle inherits what his father would have inherited had he been living. If the eldest uncle left no son, but only two daughters, the two of them take the inheritance. This, you see, is all in pursuance of the law which prefers an elder male line before a younger.

The way to do is to go up to the first ancestor (father) and exhaust all his descendants. Then go to the next ancestor (grandfather) and exhaust all his descendants. And when you have exhausted all your father's family, repeat the process on the mother's.



## ILLUSTRATION

showing who is the heir of William Jones, deceased, who died a bachelor  
(*m*, married; *d*, dead).



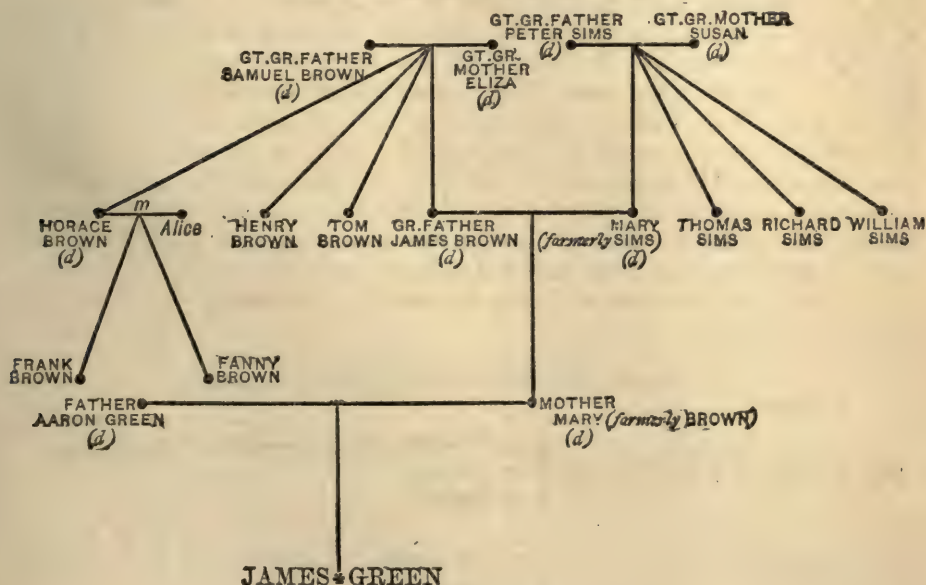
You see, Jones's mother is alive, but she has no claim so long as any of the Jones family are alive, because they are related to W. Jones on the paternal side. The nearest survivors are Aunt Eliza, Uncle Sam, and Aunt Mary. Leave out the aunts. But Uncle Sam, though he is the eldest surviving male relative on the father's side, is not the heir. Why not? Because he had an elder brother, Uncle Tom, who died leaving two daughters. These two daughters take their father's place. But as females in the same degree take together, these two, Cousin Mary and Cousin Fanny, are co-heiresses of W. Jones, their cousin—though there are at least three relatives on the father's side and several on the mother's side, nearer of kin to W. Jones.

Another rule requiring notice is that **relations of the half-blood** take next after relations in the same degree of the whole blood. Thus, if my father married (1) Jane, having by her three children—(a) Thomas, (b) William, (c) Mary; (2) Susan, having by her two children, myself and my sister Kate; and I acquire land and die intestate; Kate, being related to me by the whole blood, comes first, before Thomas, William, or Mary, who are only my half-brothers and half-sister. Take this case: Jane Jones marries (1) Thomas Smith and has two sons; (2) William Brown, and has only one son, Jeremiah. Then Jane dies, and William Brown marries Ann, who has two children—a son and a daughter. Thus, Jeremiah Brown has two half-brothers named Smith, and a half-brother and a half-sister named Brown. If Jeremiah bought land and died childless and intestate, which of the four would be his heir? The two Smiths are older than the others, but they, nevertheless, have not the first claim. Why not? Because Jeremiah's father, had he been living, would have been the heir. And relatives on his side come before all persons related

to Jeremiah through his mother. Therefore the heir is the half-brother Brown.

Further, if there is nobody to be found who was related to the deceased on his father's side, so that **the mother's kin** come in, a male maternal ancestor and his descendants rank in front of a female maternal ancestor and her descendants. Thus, William Green dies intestate and the owner of land. His father was Aaron Green, who had no relations because he was not born in wedlock. Aaron is dead. You now look at the relatives on the mother's side. Mrs. Aaron Green (who is also dead) was the daughter of James and Mary Brown. James Brown (also dead) had three brothers. Mary had also three brothers. Of course, the whole six stand in precisely the same degree of kinship to William Green, being his great-uncles. But the three brothers of James Brown (William Green's maternal grandfather) rank before the three brothers of Mary Brown (the maternal grandmother). So that the eldest of the three great-uncles on the grandfather's side will be the heir; or if he be dead, his eldest son, or the descendants of his eldest male line.

Puzzle-chart, "Find the heir"



The heir-at-law of James Green is Frank Brown; the son of his great-uncle Horace Brown. Horace would have been heir if living; and, being dead, he passes his right on to his descendants.

This diagram or "Puzzle, find the heir," will be a fine occupation for a winter's evening. You always begin from the deceased—the person whose heir you wish to find—and work up to a common ancestor, and then down



to all his descendants. In the case above, you work up to the great-grandfather, Samuel Brown, and then down to his children, and their children.

*Heritable Property in Scotland.*

Like real property in England, heritable property in Scotland goes to the heir of the deceased owner. Heritable property consists of land, all things fixed to and growing naturally in it [*e.g.* trees], and heritable bonds. And, as in England, the male line is preferred before the female; an elder male and his descendants are preferred before a younger male and his descendants. Again, as in England, when there are several females in the same degree, they all take equally together; that is, there is no preference of an elder female and her children over a younger female and her children. Thus, if a Scotsman dies owning land, and having no sons, but three daughters, the three take the land share and share alike. But if he had three sons and three daughters, the eldest son would take all the land, to the exclusion of his five brothers and sisters.

So far, the Scots law of the inheritance of land resembles the law of the rest of the United Kingdom. There is also another point of resemblance. The land descends **first to the issue** of the deceased. I mean that so long as a single descendant is living, no one else can take a share. The eldest son has the first claim. If he be dead, his eldest son comes in, and if the latter be dead his eldest son. If the eldest son of the deceased had no son, his daughters take equally together. The next claimant is the second son, and his son or daughters in like manner. And so on with the sons, one after the other. If there were no sons of the deceased, but only daughters, they come in for equal shares as co-heiresses; and if one of them has died leaving children, her share goes to her children—that is, it goes to her eldest son; or if she had no son, to her daughters equally.

Let me take the case of Angus Campbell, a landowner, who dies without having made a will.

Angus Campbell married Jessie Macgregor.

Children :

(d.) 1. John	}	children =	{	1. William (d.)	}	children =	{	1. Margaret	}	2. Jean
				2. Thomas						
				3. Helen						
2. Mary	}	children =	{	1. (d) Sarah	}	children =	{	1. James	}	2. Robert
				2. Flora						
3. Gregor	}	children =	{	1. Alexander	}					
				2. Neil						
4. Alister	}	children =	{	1. Elizabeth	}					
				2. Andrew						

Jessie (the widow) takes one-third of the rents and profits for her life. John would have succeeded as heir, but he is dead. Then his eldest son

William would have taken, but he also is dead. But William left two daughters, and these succeed to their father's and grandfather's right. Being females, however, there is no difference made between them. They take half the land each. Now, had William died without children, Thomas would have taken. And had he died childless, Helen would have taken.

But suppose John and his children and grandchildren had all died before Angus. You take the second son, Gregor, and if he is dead, his eldest son, Alexander, succeeds. If Alexander be dead, Neil takes the inheritance. If Gregor and all his descendants died before Angus Campbell, the third son, Alister, is the heir. And if he be dead, his son, Andrew; or if Andrew be dead, Elizabeth.

Not until you have exhausted the three sons of Angus Campbell, and all their descendants, male and female, do you consider the daughter, Mary. It may be, however, that John, Gregor and Alister and all their offspring died before Angus Campbell. In that case Mary becomes heir to the estate. If Mary has died also, her two daughters, Sarah and Flora, come in as co-heiresses. But Sarah is dead. Her right, however, is passed on, and as she had sons, her eldest son, James, will have his mother's share. So that Angus Campbell's co-heirs will be his granddaughter, Flora, and his great-grandson, James—the latter “representing” his mother.

When a landowner has **no children or other descendants** living at his death, his **brothers and sisters** are the next in the line of inheritance. You observe that this is different from the English law, which gives the inheritance to the father first. Thus, James Smith dies leaving landed property in England and in Scotland. He never had children. His father and a brother survive him. The father inherits the English land, the brother the Scottish land. And when brothers and sisters are the nearest in line, the **next youngest brother** has the first preference. If he be dead, leaving children, they step into their father's place, the eldest boy being again preferred. Should this brother and all his descendants be dead, the second younger brother and his descendants come in; and so on through all the younger brothers in order of birth. If the deceased left no brother younger than himself, his next elder brother comes in (and his children if he be dead), and so on up to the eldest brother. This is quite different from English law, by virtue of which an elder brother is always preferred before a younger. But if there are no brothers, then all sisters take equally and together.

Thus: James Thompson owns heritable property. He dies a bachelor, with no will. He was the third son and fourth child of his father, the family being in the following order:—

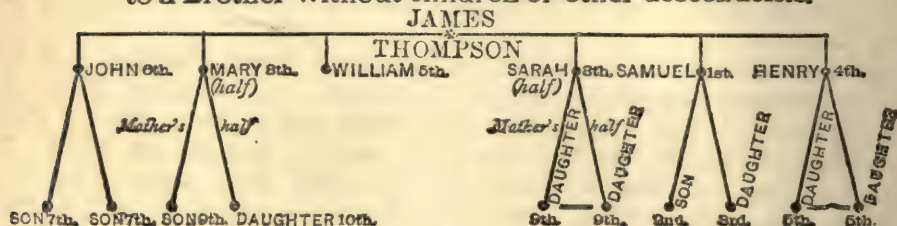
*Father* had children:

John Thompson.  
 Mary Thompson.  
 William Thompson.  
**James Thompson.**  
 Sarah Thompson.  
 Samuel Thompson.  
 Henry Thompson.



On James's death, his heir is his **next younger brother**, Samuel; and if Samuel is dead, then Samuel's son (if there is one) or daughters. After Samuel and his line come Henry and his line; then William and his line; and then John (the eldest) and his line. If they are all dead without children in any generation surviving them, then the sisters, Mary and Sarah, take half each. If Mary is dead, leaving a son, he takes his mother's half—if no son, but daughters, they take Mary's half amongst them.

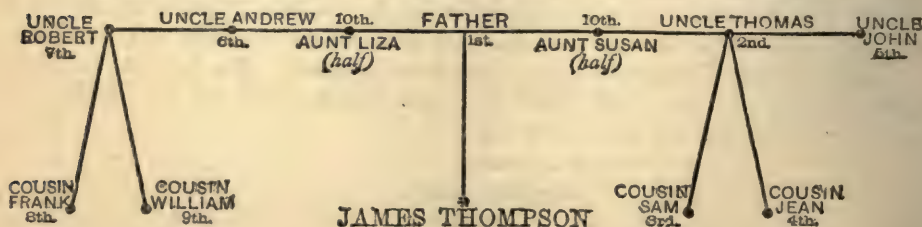
Chart showing Scottish succession  
to a Brother without children or other descendants.



I should state that brothers and sisters by the same mother, but not the same father, have no claim at all on heritable estate. Neither has the mother, or any of her relations.

After exhausting the deceased's brothers and sisters and their children and children's children to the uttermost generation, the next heirs are **the father and his collaterals**—i.e. the uncles and aunts of the deceased. The father comes first, and if he be dead his next younger brother and his children and other descendants after him. Males before females—eldest male preferred—females of the same degree together. Then the father's second younger brother and his descendants in the same way. And after exhausting all the father's younger brothers and their descendants, the father's elder brothers and their descendants come in, the youngest first. Then the father's sisters equally. The following diagram will show what I mean—the figures show the order. Uncle Robert is the eldest of the father's brothers.

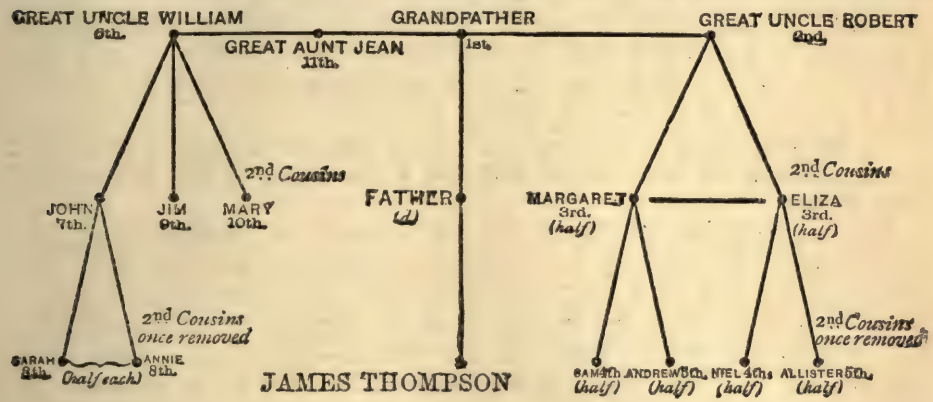
Chart of Kinship of Scottish Father and his Collaterals.



If the deceased leaves no children or issue, no brothers, sisters, nephews, nieces, father, uncles, cousins, or aunts, you resort to the **paternal grandfather and his collaterals** in the same way as in the last illustration.

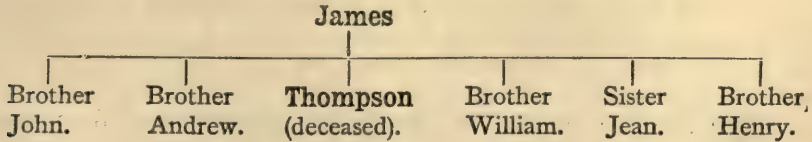
The grandfather comes first of these ; then the grandfather's next younger brother and his descendants ; then his second and succeeding younger brothers and their descendants, then the next elder brother, and so on ; and finally the grandfather's sisters and their descendants.

Chart of Kinship of Scottish Paternal Grandfather and his Collaterals.



You see, if great-uncle Robert and all his descendants are dead, aunt Jean is passed over in favour of the next male, great-uncle William. He being dead, his son John takes, and John being dead, Sarah and Annie are co-heiresses.

When the heir is also one of the next-of-kin, the Scots law provides that he shall not take a share of the movables without bringing into account the value of the heritable estate. Thus, James Thompson dies without widow or children, father or mother. He has two elder brothers, two younger brothers, and a sister. His property consists of £1,000 in money, stocks, and shares, and a plot of land worth £100.



Brother William is the heir, being the next younger brother of James ; so to William goes the plot of land. But John, Andrew, William, Jean, and Henry are equally next-of-kin, and entitled to share the £1,000. But William cannot come into the sharing unless he agrees to count his land—worth £100—as part of his share. In this case it will be manifestly to his advantage to do so ; and the £1,000 is thus divided :—



$\pounds 1,000$ (add $\pounds 100$ , value of heritable land = $\pounds 1,100$ ) :					
One-fifth ( $\pounds 220$ ) each to John, Andrew, Jean, and Henry =	$\pounds 880$				
One-fifth less $\pounds 100$ to William...	...	...	...	...	120
					<u><math>\pounds 1,000</math></u>

So that John, Andrew, Jean, and Henry take  $\pounds 220$  each in cash, and William takes  $\pounds 120$  in cash and  $\pounds 100$  worth of land.

William is not bound to put his land into the general pie unless he likes. For example, if the land were worth  $\pounds 300$  and the movables worth  $\pounds 1,000$ , William would not ask for any share of the  $\pounds 1,000$ —it would not pay him. For he would have to pay, not receive.

In England there is no such law. If the heir to the land is also one of the next-of-kin, he takes all the land and a full share of the personal property as well.

But in **one point** the law of the two countries is similar—namely, that when children are claiming the personal (movable) property of their father [when he dies without a will], they must bring into account any money or property given to them by the father in his lifetime to advance them in life. An example is this: Jones has five children—John, James, Mary, Sarah, and Samuel. As John grows up, his father articles him to an engineer, and pays  $\pounds 200$  premium. When Mary grows up and becomes a bride, her father gives her  $\pounds 100$  as a marriage portion—to help towards the furniture. James also receives  $\pounds 500$  to buy a partnership in a drapery business. Then the father dies without a will, leaving  $\pounds 5,000$  behind him. If this were divided in equal shares, there would be  $\pounds 1,000$  for each child; but John would have had  $\pounds 1,200$ , Mary  $\pounds 1,100$ , and James  $\pounds 1,500$ . So the law provides that each child shall bring his advance into account, so as to equalise the shares. Thus, of the  $\pounds 5,000$ , John will take  $\pounds 960$ , Mary,  $\pounds 1,060$ , James,  $\pounds 660$ , and Sarah and Samuel  $\pounds 1,160$  each. In this way the children receive equality of treatment; for it would not be fair if those who had had part of their father's money while he was alive should be better off than those who had to wait for his death. The method of arriving at the above figures is this:—

To the  $\pounds 5,000$  add the amounts advanced to John, Mary, and James =  $\pounds 200 + \pounds 100 + \pounds 500 = \pounds 800$ .

Count the whole estate as  $\pounds 5,800$  and divide it into five shares, namely:—

John $\pounds 1,160$ : but he has already had $\pounds 200$ —leaving ...	$\pounds 960$
Mary $\pounds 1,160$ : but she has already had $\pounds 100$ —leaving ..	1,060
James $\pounds 1,160$ : but he has already had $\pounds 500$ —leaving ...	660
Samuel $\pounds 1,160$ : he has had nothing from his father in his lifetime ... ..	1,160
Sarah $\pounds 1,160$ : she has had nothing from her father in his lifetime ... ..	1,160
<u><math>\pounds 5,000</math></u>	

**What are advances?**—This is an important question because it is only advances that have to be accounted for as above described. The best definition is, “A sum given by a parent in his lifetime for the purpose of advancing the child in life.” Thus, a premium paid for apprenticeship ; a marriage portion or “tocher” ; or sum given to set the child up in business. But not money paid for food, clothing, or education ; and not a mere present of a small sum of money or an ornament. Thus, if my father were in the habit of giving me a £5 note on my birthday, giving nothing to my brothers and sisters on their birthdays, they cannot make me deduct that from my share. Nor if he gave me a gold watch and chain ; nor must my sister take into account her wedding present as distinguished from her “tocher” or dowry.



## CHAPTER IV.

### TRUSTS AND TRUSTEES.

What is a trustee?—Active or passive—Duties—To get in the property—Speculative and diminishing or wasting securities—How trustees get into trouble—An old story: Never hold land—Duty to invest—Safety, not high interest—Not in trading concerns—Not so as to favour one beneficiary at another's expense—Lending on mortgage and heritable bond—But not on mortgage of a factory, etc.—How much to lend—Land valued by competent surveyor—Not on second or third mortgage—Sometimes on mortgage of leaseholds—List of trustee securities—Not on any security where the interest depends on the business done—Consequences of investing in wrong securities—Cannot set-off a good unlawful investment against a bad one—Investments must be made at once—How trustees are appointed—Judicial trustees—Remuneration of trustees—Expenses—Out of what payable—Trustee (except judicial) not entitled to make a profit—Trustee dealing with beneficiaries—Duty to keep accounts.

**What is a trustee?**—A trustee is a person whose business it is to hold or own property for the benefit of someone else. As regards the outside world, the trustee is the owner of the property; but as between himself and the beneficiaries, the trustee is not the owner; he is either the manager of the property for another's benefit, or else he is a mere custodian, who does not himself manage the property, but merely looks to it that the person in possession does not waste or injure the property or make away with it to the detriment of those who are to succeed him. The former kind is called an *active* trustee; the latter a *passive* trustee.

An active trustee is this kind of man: His trust-deed says something to this effect: "I devise and bequeath all my land and the sum of £10,000 to John Jones upon trust, to pay the rents, income and profits thereof to my wife Susan during her life, and after her death to convert the same into money and to pay and divide such money to and amongst my children in equal shares as and when they attain the age of twenty-one." You see, John Jones has something to do. He must first invest the £10,000. Then he must collect the rents of the lands and the dividends of the investments. He must pay over these rents and dividends to the wife so long as she lives; and, last of all, he must sell the whole property when the wife dies, and share it up as directed.

A passive trustee is a very different kind of gentleman.

His trust-deed orders him "*To permit* my wife to enjoy the use of my house and the furniture therein during her life, and after her death to sell and divide the proceeds, etc." You observe, during the life of the wife the trustee has nothing to do as regards the house and furniture. In law they are his, so that the

lady who has the use of them cannot sell them or otherwise dispose of them. Neither has she any right to make alterations in the house. And she is liable to be pulled up if she does damage to the house or the furniture. In fact, it is almost as though the trustee let her have the use of his own house and goods. But not quite; because if he allowed her to use his own property and she wasted it, destroyed it, or attempted to dispose of it, he need not interfere with her; but in the case of trust property he must interpose. That is what he is there for.

A Scottish judge once said "that the difference between an executor and a trustee is that the executor has to administer the property, the trustee to hold it." The executor has a year (except in very exceptional circumstances) in which to administer the estate. In that time he ought to have paid all debts and collected all assets that were outstanding. Out of the surplus he should pay any legacies given by the will, and if any property is left in trust he should hand it over to the trustees. Very often the executors are also the trustees, and then there is no need for any handing over.

The trustees' **first duty to the estate** is *to get in the property*. I mean, to get it under their control so that they can deal with it, and so that nobody else can deal with it. This duty makes it compulsory on the trustees to have all stocks, shares, and other investments transferred into their names, and, in England, if the testator died after 1897, to ask the executors to make a conveyance of the land. One trustee should not allow the other to have any investment in his own sole name; nor should he give him a power of attorney to act for both.

The second duty of the trustee is to convert such parts of the property as consist of wasting, **speculative and unsafe securities or investments** into cash, and to invest the money in some security authorised by law. A trust is almost invariably created because it is wished to give the benefit of property to persons in succession. The commonest form of this among people of moderate means is when a husband and father makes a will leaving his property to trustees in trust for his widow for her life, and after her death to be divided amongst her children.

Let us suppose Mr. Jones makes such a will, and that on his death his property is found to consist of an insurance policy for £500, a leasehold house held on a lease for twenty-one years at a ground rent of £10 a year, and sub-let to a yearly tenant for £60 a year. There are also a few debts owing to Mr. Jones and a few owing by him; these just about balance. In addition, Mr. Jones had £200 invested in Consols and £300 in a Peruvian silver mine. Unless the trustees have a power given to them by the will to retain the investments as they stand, this is what to do. The Consols may be left untouched, because they are an authorised safe security. The Peruvian mining shares must be sold, and that speedily, for they are of a highly speculative nature. It does not matter one iota how big a dividend the shares happen to be paying at the time. Sold they must be. Then the business must be sold also. I have already told you in the chapter on Wills that executors have no power to carry on a business except for the purpose



of winding it up. The same applies to trustees. If part of a trust property consists of a business, the trustees can carry on the business simply for the purpose of selling it. And they ought to sell it as soon as possible; for so long as they carry it on they are personally liable for any debts that may be contracted. They can recoup themselves out of the trust property so far as it will go, but they may lose heavily, and the trust property may not be enough to pay them.

The leasehold house must be sold also; not because it is speculative, but because it is a wasting security. In other words, it becomes less and less valuable each year. If the trustees were to keep it, and pay the rent to Mrs. Jones, that lady would be getting more than her share. Suppose she were to live sixteen years after Mr. Jones's death, she would be drawing from that property £50 a year (£800 in all), and there would only be five years' rent (£250 in all) for the children. This would be manifestly unfair; and the only way to equalise the matter is to capitalise the lease at Jones's death, invest the money, and pay the dividends to Mrs. Jones as long as she lives.

This **duty of converting into money all risky and wasting property** is one of the most important duties of trustees, and, I am sorry to say, a duty frequently neglected. It is **an old, old story**. Smith and Williams are left trustees of the will of their friend Jones, a yeoman farmer. The will is in the usual form; that is, on trust for the widow for life, and afterwards to the children. When Jones died he was living at the farm with his wife and small family. When the trustees were called upon to act, they allowed Mrs. Jones to continue in occupation and carry on the farm as before. The eldest son, a lad of fourteen, assisted his mother, and when she died he was old enough to carry on the concern, his younger brothers and sisters living with him on the place. But agricultural depression makes itself felt, and the farm is not worth much more than half what it was when old Mr. Jones died. Then one of the girls becomes engaged and marries a local tradesman. He soon finds out from her the terms of her father's will, and on his next visit to his solicitor informs that gentleman that his (the client's) wife had a bit of property left her by her father's will, and asks how that property is to be got at. In the end, the matter is put into the lawyer's hands, and he, "on behalf of my client, Mrs. Baggs" (formerly Miss Fanny Jones), demands from the trustees an account of their trust. Too late, the trustees consult their own lawyer, and he speedily advises them that they are in a very uncomfortable plight. "You ought," he says, "to have sold the farm, bag and baggage, as soon as Mr. Jones died. Even if you had power to allow Mrs. Jones to keep it on, you should have sold it at once on her death." And so the trustees will find themselves liable to pay the difference between what the farm and farm stock would have fetched twenty years ago and what they will fetch to-day, together with interest at 4 per cent. For a trustee should **never hold land**. He may hold a mortgage on land—that is quite a different matter. And he should never hold a business. And a farm is both.

All this, of course, is subject to any direction to the contrary given in

the will. For example, if the will says, "to hold my farm and other property during the life of my wife, and to pay the income (etc.) to her, and after her death to sell and divide the same amongst my children," the trustees will be justified in holding the land until the wife's death, because the sale is only directed to take place after her death. And it is a common occurrence for a will to direct the trustees to hold land during the life of one person, and after that person's death to hand it over to another. In such a case the trustees would not sell. They would put the life tenant in possession; and when he or she is dead, allow the other person to go in.

After converting all property of a convertible kind into money, the next **duty is to invest** that money. And I need hardly say that trustees are limited in their choice of investments to certain classes declared by the law to be safe. **Safety, not high returns**, should be the motto of the trustee. It is, therefore, proper to invest only in securities which are not liable to fluctuate, and the interest and dividend on which does not depend on or vary with the profits of the business. For example, the debenture stock of some railways is allowed to be trust security, because the rate of interest does not vary with or depend on the profits of the line; and also because the debentures are secured upon the whole of the undertaking and property of the railway—*i.e.* the holders of debentures are mortgagees and can, if their interest be not paid, ask the Court to send someone in possession of the railway for them, and ultimately to sell the railway and everything belonging to it. On the other hand, the ordinary stock of a railway is never a trustee security, because the holder of ordinary stock is neither more nor less than a partner in a trading concern. His dividend depends on the profits earned, and these may be anything from 15 per cent. in a prosperous year to  $\frac{1}{2}$  per cent. in a "strike" year. And the selling price of ordinary shares naturally fluctuates with the dividends. So that trustees who have bought them at a high price are just as likely as not to find that in the year when the property has to be distributed they have considerably decreased in market value. I have known cases in which trustees who have bought shares at a high premium have been compelled to sell them at a heavy loss. In one case foreign railway ordinary stock was purchased at the price of £178 for each nominal £100 worth. The railway at that time was paying about 12 per cent., so that the investment was highly remunerative. But bad times came, and the dividends went down to about 6 per cent., at which they stood when the time came for the trustees to sell out and share the proceeds amongst the children of the testator. The shares only realised £120 each—a clear loss of £58 a share. Thus, the estate which was originally £4,000 when the testator died, had shrunk to less than £3,000 when it came to be divided amongst the children.

The trustees in this case had made their investment for the express purpose of obtaining high interest to supply a decent income to the testator's widow, who was entitled to the income of the money for her life. This they had obtained; but at a sacrifice of capital. The children, who were entitled to the capital on their mother's death, naturally asked the trustees



to account for the enormous difference between the original trust fund and the amount that remained. The trustees made answer that they had been obliged to invest in a security bearing high interest for the sake of the widow. This excuse was not a valid one; for the children had as good a right to have the capital preserved intact as the widow had to her interest for life. And it is the duty of trustees above all things **not to favour one beneficiary at the expense or risk of another.** This is one reason why trustees must not invest in speculative or trading investments, no matter how rosy they look at the time.

One of the approved trustees' securities is the **lending of money on mortgage or bond** of land. They must not buy land, because if they do they take the risk of not being able to let it. Thus, if trustees buy three houses, and one of them happens to remain unlet for six months—an event which may happen in the case of any landlord—there is so much of the money bringing in no income. Again, the land might not be able to be sold for the same price at which it was bought, for landed property fluctuates in value, though not so much as stocks and shares. But when you lend money on mortgage or bond, you first have the property valued, and you never lend up to the full value. In fact, trustees are acting wrongly if they lend more than **two-thirds of the value** as valued by a competent surveyor. So that if it comes to a forced sale, the trustees will almost certainly realise the amount of their loan; for it is extremely improbable that the property will not fetch two-thirds of its value. And it is also highly improbable that it will have depreciated to the extent of one-third. It is, in fact, the business of the trustee not to allow it to depreciate to that extent. If he finds that it is not being kept in repair, or is going down owing to decay of the neighbourhood, he should promptly give notice to the borrower to pay off the mortgage or bond. And if this is not done, he should proceed to sell at once.

As to the interest, the borrower is liable personally to pay it; so that the trustees have his personal security as well as the security of the property.

**Trustees ought never to lend** money on the security of land and buildings which depend for their value on the fact that they are used for a particular trade or manufacture, or on property which from its nature cannot be easily let or sold. A mortgage or bond on a factory is open to all these objections; therefore a trustee should never invest trust money on such security. Suppose, for instance, a trustee is asked to lend money on a mortgage of Coats's Thread Works—a most valuable property. He must decline to make the loan, because if Messrs. Coats were to give up business or to move their trade to another building, the trustee's bond would be worth next to nothing. To begin with, the disused works would be difficult to let, except to a thread manufacturer in a large way of business; and these are few and far between. And, again, the premises would be difficult to sell except at a knock-out price for the same reason. In fact, the value of the premises depends almost wholly upon the fact that a prosperous business is being carried on there.

To compare this with a mortgage on a house or shop. Almost any house is worth as much to one man as to another. It will readily sell at something like its value, and the same applies to a shop. I would, however, say this to trustees: When you lend money on house property, do not lend a large proportion of the trust fund on the security of one house. It is better to lend three times £400 on the security of three small villas worth £600 each than to advance £1,200 on the security of a mansion worth £1,800, or even worth twice that amount. In giving this advice, I am simply repeating the proverbial wisdom of our ancestors—"Never carry all your eggs in one basket."

Trustees who lend on the basis of a valuation by a qualified surveyor are not liable even if the money or part of it be lost by reason of the property being of less value than the report of the surveyor showed. But as a trustee is only allowed to lend up to the value of two-thirds of the property, if he lends more than that amount he is liable to make good anything beyond that is advanced and lost. Thus, if trustees are asked to invest on mortgage of three houses, and the surveyor reports the value to be £1,200, the trustees may lawfully lend £800; and if, when the security comes to be realised, the houses only fetch £600, the trustees are not liable to make up the missing £200. But if they lend £900, and the property afterwards realises £700, the trustees are liable to make up £100 out of their own pocket—that is, the [amount they have lent beyond what they ought to have lent (£800).

Again, trustees **must never take as security** a second, or third, or subsequent mortgage on property. Nor must they ever put trust money into a contributory mortgage. A contributory mortgage is of this kind: Lord Fitzgame wishes to raise a large sum on mortgage of his estate—say £50,000. He puts the matter into his lawyer's hands, and the lawyer, being unable to find anyone with such a large sum for investment in a lump, resorts to the plan of inducing several of his clients to advance the money in varying sums. The mortgage is made out in the name of one or two as trustees for the whole number, and these receive the whole interest on the £50,000 and distribute it amongst the contributors. Thus, A will put in £5,000; B, £3,000; C, £10,000, and so on. Now, although such a mortgage might be quite proper for an ordinary investor, it is not allowable for a trustee; and if trustee money should be lost in such a venture, the trustee will have to make it good. Such mortgages have rather gone out of fashion nowadays; because owing to the existence of insurance offices and other wealthy corporations with large sums waiting to be invested, there is not very much difficulty in obtaining the money in a lump from one lender.

As a rule, trustees must confine their mortgage investments to freehold property; but it is permissible for them to invest on mortgage of leasehold property to a limited extent (in England). That is, they may lend where the lease has at least two hundred years to run, and there is only a nominal rent to pay, and no burdensome covenants to perform. Thus, a trustee could not lend on a lease where the rent was (say) £5 a year, nor where the lessee was bound to repair the premises.



Besides mortgages and bonds there are many **other investments open to trustees**; and the number of these investments is being enlarged from time to time. Formerly they were restricted to a few Government securities, such as Consols; but this restriction was found to operate anything but beneficially. For it meant that trustees having money in hand were compelled to buy these classes of stock at the price at which they happened to stand. Here is a list of trustee investments, to which other securities will doubtless be added occasionally, either by Act of Parliament or by the Rules of Court. Thus, when a town or borough raises a loan by virtue of a local Act of Parliament, the sanction of Parliament is sometimes obtained to make the loan stock a trustee security.

#### LIST OF TRUSTEE SECURITIES.

*Consols*:  $2\frac{1}{2}$  per cent.;  $2\frac{1}{4}$  p.c. Annuities (redeemable 1905);  $2\frac{1}{2}$  p.c. Annuities (redeemable 1905). Local Loans Stock: 3 p.c. (redeemable on one month's notice after April 1st, 1912).

*Indian Government*  $3\frac{1}{2}$  and 3 p.c. Stock (redeemable in 1931 and 1948 respectively) or any future Indian Government Stock.

*Bank of England and Bank of Ireland* Stock. Scottish trustees are not allowed to invest in Bank of Ireland Stock.

*Any securities the interest of which is guaranteed by Parliament*: Including Canadian 4 p.c. guaranteed Bonds; 4 p.c. Bonds; and 4 p.c. Bonds of the Intercolonial Railway Loan. Egyptian 3 p.c. Loan. Jamaica 4 p.c. guaranteed Loan. Turkish 4 p.c. guaranteed Bonds. Mauritius Government 3 p.c. inscribed Loan.

*Metropolitan Consolidated Stock or Police Debenture Stock* [not open to Scottish trustees].

\* *British and Irish Railway Stock*, debenture or rent-charge or guaranteed or preference stock, provided that the company was incorporated by Act of Parliament (*i.e.* not a private railway) and has paid a dividend on its ordinary stock for the last ten years. Trustees must never invest in ordinary railway stock. Scottish trustees must not invest in Irish railways, and I do not advise trustees to invest unless the railway has paid at least 3 p.c. on its ordinary shares or stock.

\* *Railway or Canal Stock*, of a railway or canal company in Great Britain, which has leased its undertaking to another public railway company for ever or for not less than two hundred years at a fixed rent—*e.g.* the Aberdare Railway Company, which is leased to the Taff Vale Railway. These are not Scottish investments.

\* *Indian Railways* debenture stock, where the interest is guaranteed by the Indian Government; and also any stock of an Indian railway where the Government guarantees a fixed or minimum dividend in sterling money (*i.e.* not rupees). These are, at the time of writing (the list may at some time be extended): Assam-Bengal Railway; Bengal Nagpur; Bombay, Baroda, and Central India Railway; Delhi-Umballa-Kalka Railway; Eastern Bengal Railway; East Indian Railway, Annuity "B," and 4 p.c. Debenture Stock; East-

Indian Railway, Annuity "B,"  $4\frac{1}{2}$  p.c., Irredeemable Debentures, Annuity "C" and Annuity "D"; Great Indian Peninsula Railway, both capital stock and 4 p.c. Irredeemable Debenture Stock; Indian Midland Railway, ordinary; Madras Railway  $4\frac{1}{4}$  p.c.,  $4\frac{3}{4}$  p.c., and 5 p.c. (different issues); Scinde, Punjaub, and Delhi Railway, Annuity "B"; Southern Mahratta Railway consolidated stock, and 4 p.c. Debentures; South Indian Railway,  $4\frac{1}{4}$  Debenture Stock, and Capital Stock.

No Indian Railway is a good Scottish trust security.

\* *Municipal Corporation* Stock: English or Irish trustees must take care that the population of the borough was at least 50,000 at the last census, and that the loan is nominal or prescribed stock issued under an Act of Parliament or a Provisional Order of the Local Government Board. For Scottish trustees the population does not matter, so long as the stock or annuities shall be secured upon rates or taxes levied by authority of an Act of Parliament.

\* *Water Companies'* debenture, guaranteed, or preference stock, when established in Great Britain or Ireland by Royal Charter or Act of Parliament. But the Company must have paid at least 5 p.c. on its ordinary stock for each of the ten preceding years. This is not a Scottish trustee investment.

These water companies include the Bristol, East London, Chelsea, Airdrie and Coatbridge, Devonport, Grand Junction, New River, Newcastle, Maidstone, and a few others.

The securities marked \* cannot be purchased by English and Irish trustees at a price exceeding the redemption value, when the redemption must or may take place within fifteen years of the investment. Nor, when they are liable to be redeemed at par, must these securities be purchased by English and Irish trustees at more than 15 p.c. premium. Scottish trustees are not under these restrictions. Thus, Bath Corporation Stock is redeemable in 1909, and is thus not a trustee stock. Again, Bradford  $3\frac{1}{2}$  p.c. Corporation Stock is not eligible when it stands at 118, as it does on the day of writing.

Scottish trustees are further at liberty to purchase feu duties and ground-annuals, and to lend money on the security of any stock which the law allows them to purchase.

Trustees, however, like other men, are fallible, and do not always obey the law. Most chiefly do they break the law with regard to investment of the trust funds; and instead of investing in safe and solid Consols at  $2\frac{3}{4}$  per cent., they dabble in the Bonds of Egypt and Argentina. It is hard to do otherwise, sometimes. I have known cases of this kind: Jones and Smith have become trustees for their friend Brown, whose estate at his death is worth £2,000 clear. This Brown has left in trust for Mrs. Brown to enjoy the interest during her life, and on her death for the capital to be shared between the three children. Now, if £2,000 were invested in trustee securities, it would probably not obtain more than 3 per cent. interest at the outside, unless the trustees happened to alight on a good mortgage, paying



$3\frac{1}{2}$  to 4 per cent. At the outside figure, Mrs. Brown's income would not be more than £80 a year. And it may be that the Browns were accustomed to live in good style, so that £80 a year is practically starvation for the widow. Wherefore that lady hies to Jones and Smith and begs of them to invest the money in something that will bring in a bigger return. In an evil moment they consent, and lay out the trust money as to £1,000 in Buenos Ayres Railway Stock at the price of 94, and as to the other £1,000 in Argentine Bonds at 96. By this means they get about 7 per cent. for their money, and Mrs. Brown's income is £140 a year.

But Mrs. Brown dies, and the trustees have to sell out in order to divide the money amongst the young Browns. The Buenos Ayres Railway Stock has gone up to 134, thus realising a profit of £40 on every hundred; but the Argentine Bonds have gone sadly down, down to 52, in fact—a loss of £44 on every hundred. If you work this out, you will find that the trustees have made a profit of about £420 on the Buenos Ayres Railway, and a loss of about £450 on the Argentine Bonds—a total loss of about £30 to the estate. Now, you might imagine that the trustees were bound only to pay the £30 lost, but you would be mistaken. They are bound to give the estate the benefit of profitable unauthorised investment, and themselves to bear the brunt of the unprofitable unauthorised investments. In effect, they must hand over the whole of the money received from the sale of the Buenos Ayres Railway Stock (about £1,420) and make up the whole £1,000 they invested in the Argentine Bonds.

To put it another way, when trustees make improper investments, and one turns out brilliantly and the other disastrously, **they cannot set the one off against the other.** It is exactly the same if the income only is in question. Thus, a trustee puts money into shares of the Undivided Skirt Company, Limited, and more money into the Seamless Brick Company, Limited. The first lot of shares pays 10 per cent., the latter only 2 per cent. The trustee must make up the interest on the last-mentioned shares to 4 per cent., and pay over the whole 10 per cent. earned by the first investments. Both investments were irregular, and he cannot set-off a successful against an unsuccessful irregularity.

I ought to add that **some trust-deeds and wills** give the trustees power to make other investments than those authorised by the general law. In such cases the trustees are safe so long as they do not go beyond the securities sanctioned by the deed or will, provided—and this ought to be remembered—that they exercise an honest discretion. Thus, a trustee authorised to invest in the shares of industrial companies ought not to invest in any shares without making inquiries. If he does, he will be liable for the consequences.

As I have indicated, trustees are **bound with all speed to invest** the trust funds in their hands. They neglect this duty at their peril. And the peril is twofold. If trustees have trust money in the bank—either on deposit at interest or simply lying there waiting investment—they run the risk of having to make it good out of their own pockets if the bank breaks. "Is it

wrong, then," I hear a reader ask, "to pay trust money into a bank?" No, it is not. But it is wrong to let it remain there any longer than you can help. You ought at once to look out for an investment, and lay the money out; and if you permit the fund to remain at the bank longer than is absolutely necessary for you to find an investment, you are negligent. Again, if you allow the money to remain uninvested for such an unreasonable time, you will be liable to pay interest on it at 4 per cent.—even though the money is quite safe at the bank. The moral of which is—invest trust money at once.

**How trustees are appointed.**—A trustee is appointed either (1) by will or by some deed or writing made by the person desirous of creating a trust (2) If the trustees appointed by the will or deed refuse to act, or die, others can be appointed. It happens sometimes that a will or deed says that any new trustee required to be appointed shall be appointed by a particular person. But if no one is named as having the right to nominate new trustees, this is how it is done: So long as there are two trustees left, there is no need to appoint another; but if there were originally two or more persons named as trustees, and these by death or resignation have become reduced to one, this one selects another to act with him. Thus, Jones makes a will, and appoints Smith and Thomas his trustees. Thomas dies. Smith can and ought to appoint another trustee in Thomas's place.

But suppose Thomas dies and then Smith dies before having taken in a colleague. What then? Well, Smith's executor succeeds as trustee, and he ought to make an appointment of two trustees to act in place of those who are dead. If Smith leaves no executor or administrator, the only course is to go to the Court and ask for an appointment of a trustee.

**Judicial trustees** are a modern creation. They are **paid trustees** appointed by the Court in this way. When anybody desires to place property in trust, either by a deed during his lifetime or by will after his death, instead of plaguing his friends to act, he can go to the Court (for which he will employ a lawyer) and state that he desires the Court to appoint a trustee to act. He can nominate somebody, who will generally be a solicitor, for the post; or if he cannot find anybody willing and suitable, the Court will find somebody—an official of the Court as a last resource. The trustee acts under the control of the judge who appoints him. He prepares accounts of his dealings with the trust property from time to time, and submits them to the judge. And he is allowed a commission or other remuneration for his trouble.

A trustee of this kind can also be appointed upon the application of a trustee or of any person who takes benefits under a trust. Thus, Jones leaves his estate to Smith and Brown as trustees in trust for Mrs. Jones for her life, and afterwards in certain shares for William, John, and Mary Jones. Smith or Brown may apply to be relieved of their charge and to have a judicial trustee appointed in his place. Mrs. Jones, William, John, or Mary can also ask a judge to nominate a judicial trustee in place of Smith, or Brown, or to act along with Smith or Brown. It is hardly worth while asking



for a judicial trustee unless the property is very large or the trust is likely to last a very long time, because it is cheaper to have trustees who give their services than a man who is paid.

For the rule is that **no trustee can claim remuneration for his services**, unless the trust declares that he may. Usually, when you appoint a solicitor to be one of your trustees (a very common thing), you give him the right to charge the estate for his professional services—that is, such services as your trustees would have had to engage a solicitor to perform. But unless the will or trust deed says so, a trustee must act gratuitously. Not only can he claim no reward for his trouble, but he cannot even make a claim for loss of time. Thus, if he has to spend a day in going to look after the trust property, and so loses a day's work, he cannot claim the wages he has lost. He can only recoup himself out of the trust money his actual expenses—railway fare, cab fare, and the like.

The rule that a trustee (except a judicial trustee) cannot charge for his services is only a branch of the rule that **a trustee must not make any profit out of his office**. And to insure that he does not, he is prohibited from dealing with the trust property in any way that may turn out to his own advantage. Thus, if the trust property has to be sold, the trustee must not buy it. If he does, the Court will cancel the bargain. And it makes not the least difference whether the trustee gave a fair price or not. The judge will not inquire into that matter. His lordship will say, "It was the trustee's duty to see that the best possible price was obtained for this property. His interest as buyer was to purchase for as low a figure as possible. And I will not allow a trustee to place himself in such a position that his duty to the trust conflicts with his private interest." It may be, of course, that in a particular instance the trustee has been so conscientious as to give the full value or more than the value of the property; but he has violated a rule which is essential for the proper protection of people whose property is in trust. He must, therefore, take back his money and hand over the property again.

It may be that he has re-sold the property, in which case he must hand over any profit he has made. In one case a trustee purchased the trust property from the beneficiary at a very fair and reasonable price. A long time afterwards, he sold again to somebody who had taken a great fancy to the land in question, and was prepared to give a fancy price for it—that is, a price not based on the market value. The trustee in this way made about £10,000 profit. He had to give it all up, for it was accounted part of the trust fund.

In the same way, a trustee cannot lawfully sell to the trust. For instance, he cannot lend trust money to himself on a mortgage or bond on his own land. And this notwithstanding the fact that the security is a good one, and the interest to be paid is more than could be got elsewhere.

But although trustees cannot charge for their time and trouble, they are **entitled to be repaid out-of-pocket expenses**. This is but right and fair. A question sometimes arises, however, as to how far the trustee can retain

the income of the trust property for the purpose of recouping himself. Thus, a trustee is called upon to bring or to defend an action at law on account of the trust, and the lawyer's bill comes to £50. Of course, the trustee is liable to pay this to the lawyer. But then he is entitled to stop it out of the trust money. Now suppose the trust is "to pay the income of the property to Mrs. Jones for her life, and after her death to pay and transfer the capital to Samuel Jones." Just after paying the lawyer's bill, the trustee receives £50, the half-year's income of the fund. He says, "This will just repay the £50 I have spent"; and so he puts it in his pocket. Then Mrs. Jones wants to know where her income is, and the trustee explains that he has retained it to cover his disbursements. "But," says Mrs. Jones, "why do you not sell out £50 worth of capital and pay yourself? You have no right to stop my half-year's income." Wherein Mrs. Jones is altogether mistaken. A trustee has the right to recoup himself out of any trust money he can put his fingers on, whether capital or income. And it makes not the slightest difference to him whether Mrs. Jones retires to the workhouse for six months or not. Still, it is usual for trustees to raise money to meet any extraordinary expenditure out of capital, and not wholly out of income.

It is also the duty of a trustee **to keep accounts and to render accounts** on demand. Any person entitled to a share of the trust fund has always the right to ask the trustee to submit an account of his dealings with the trust property up to date; and the trustee should always have his accounts ready so that he can immediately submit them for inspection. The account should be complete and full, dealing with exact sums, and not with approximate or lump sums. Thus, it will not do for the trustee, when asked to account, to say that the property consisted of about £8,000, made up of land and houses, debts, and stocks and shares. He must say (for example), "The property consists of six acres of freehold land at Derby, worth £3,000; two cottages at Chelmsford, worth £400; £600 London and North-Western Railway Stock," and so on, giving the items. Again, the trustee ought to be ready at all times to produce the securities upon which the trust funds are invested, and also all receipts and vouchers for payments made. And it is advisable, even when no demand is made, for the trustee every now and then to meet the beneficiaries and lay before them a statement of his accounts, together with receipts and vouchers. This account should be thoroughly explained, and the beneficiaries asked to sign it if they are satisfied. At the foot of the account should be written: "Examined by us the undersigned, and signed as and for a settled account," and the signatures should follow.

If this be done, the trustees will be amply protected from possible annoyance in the future. For a "settled account" cannot be reopened unless the one who wishes to reopen it can prove that the other party has been guilty of fraud.

My advice to trustees is to keep a book or books of account and enter every payment made and all sums received at once; and to ask the beneficiaries to sign the book when the accounts are gone into from time to time.



## CHAPTER V.

### MONEY IN CHANCERY AND UNCLAIMED FUNDS.

**What is money in Chancery?**—How it came there—It is all money belonging to trusts and inheritances—Infants' property—The sums are usually small—How to get at the money—The list published by the authority of the Government—How to get information about a fund—All claims must be strictly proved in open Court—The missing link—An unprofitable occupation—Property in the hands of the Crown—Petitions of right—Claims must be made within twenty years—Proving a pedigree.

**I** DARESAY everybody has heard of "money in Chancery." But I very much doubt whether many people know what the money is, or how it came into Chancery, or how it gets out. As a matter of fact, "money in Chancery" is a misnomer. For there is now no Court of Chancery as a separate organisation. There is a Chancery Division of the High Court of Justice. And the money commonly called money in Chancery is money standing in the books of the Supreme Court Pay Office.

**How did it get there?**—Well, it has been accumulating longer than anyone can remember. Some of the funds have been lying and accumulating there since the middle of the eighteenth century. In the last published list there is a record of a fund paid into Court in the year 1744. All this money consists of sums, large and small, paid into Court in connection with trusts and inheritances.

For instance, let us imagine that Jones, in the year 1812, left property to trustees in trust for his five sons. Of these sons, Richard had emigrated to America. Some dispute having arisen between one of the other sons and the trustees, the son in question brought an action against the trustees, with the result that they were ordered to pay the money representing the trust property into Court. This they did by paying the fund into the Bank of England, to an account bearing the name of the action. And as the action would relate to the trusts of old Thomas Jones's will, the money would be paid to the credit of an account called "In the matter of the trusts of the will of Thomas Jones."

When the action was over, the four brothers would be able to take their shares out. But Richard, having gone abroad and being in those days almost out of the reach of communication, did not appear to claim his part. So the judge ordered Richard's share to be retained and placed to the credit of an account called "In the matter of the trusts of the will of Thomas Jones deceased, and in the matter of the share of Richard Jones." And if neither Richard Jones

nor any of his descendants have put in a claim hitherto, the money is there to this day.

Again, a Life Insurance Society has policy money in hand on the death of a policy-holder. There are conflicting claims to the money; and the Society, for its own protection, pays the money into the Bank to the credit of the Paymaster-General, and to the credit of a particular account bearing the name of the deceased policy-holder. Then the people who claim a right to the money must fight the question out in the Chancery Division of the Court; and the one who is decided to be entitled will obtain an order directing the money to be paid to him.

Another way in which large sums of money come to be in the Court is by payment in by trustees. When trustees have money in hand in trust for people who cannot give a receipt for it, the trustees pay the money into the Court. Thus, a man leaves property in trust for his widow for her life, and after her death in trust for his children. When the widow dies, the children are all young—say, for instance, the eldest is only ten. The trustees can pay the money into Court to await the coming of age of these infants. Such money as this is not unclaimed “money in Chancery”; and I only mention it to show you that of the sums appearing in the list soon to be mentioned, there is a large amount not by any means going a-begging, though there is some that is looking for an owner.

There is a popular delusion that the unclaimed funds in Chancery consist of a large number of vast sums—amounting, in fact, to untold millions. This is far from being the case; for of the various amounts waiting to be claimed, one-half does not exceed £150, and only one-seventeenth of the whole exceeds £1,000. Still, if there should be any of the money to which you have a right, you might as well have it; and I propose to tell you **how** to set about getting it.

In the first place, go to Messrs. Harrison & Sons, of 45, St. Martin's Lane, London, W.C., and purchase for one shilling the last supplement to *The London Gazette* which gives a “List of Accounts of Unclaimed Funds in Books of the Supreme Court.” This **List is published by Government authority** every three years, and can be relied on. In it you will find a list of names arranged alphabetically, and you will search here for the name you want. Thus, if you think that your great-grandfather (William Morison) left half his estate to your mother (Mary Green), and that this money is in Court, you will look for “Morison” and “Green”—or “Morison, William,” and “Green, Mary.” For the sake of your own peace of mind, do not, if you happen to see either or both of these names, jump to the conclusion that they refer to the people you are inquiring about. In the United Kingdom there are so many scores of people of the same name that the odds are hundreds to one against you.

Having found your name, however, look at the other columns in the list; and there you will see (1) the date of the payment into Court; and (2) the dates of the orders made with regard to the fund. These orders will be found at the Record Office, Chancery Lane, W.C., if more than twenty years old, and at the



Filing Department, Central Office, Royal Courts, Strand, W.C., if not more than twenty years old. The Record Office will allow you to look at them on paying one shilling; the Filing Department's charge is 2s. 6d. From these orders you stand some chance of finding out what the fund consists of and whose money it is.

If you want to know how much money there is in the fund, you must write to "The Assistant Paymaster-General, Royal Courts of Justice, Strand, London, W.C."

Each application for information must be signed by the applicant; or, it made by a solicitor, he must state the name and address of the client by whom he is instructed, and that he believes him or her to be beneficially interested in the fund.

If the application is made by any person other than a solicitor, he must state the grounds upon which he claims to be interested in the particular matter or suit quoted in his application, bearing in mind that the mere fact of the surname of the original owner of the property being the same as that of one of the parties to a suit is not sufficient to support a claim.

The correct title of the matter or suit must be quoted from the authorised list, otherwise it is not possible in most cases to trace the account referred to.

The published list is only a list of the titles of accounts, and is not, in any sense, either a register of next-of-kin, or of heirs wanted, or of lapsed legacies, or of unclaimed estates.

As the Pay Office is not an office of legal inquiry, and has no knowledge of the origin or particulars of the lawsuits referred to, it is quite useless to furnish baptismal or other certificates in support of an alleged claim, nor has the Pay Office any means of investigating it in its legal bearings.

No wills, probates, or letters of administration are kept at the Pay Office.

Each request for information respecting a matter or suit in the list must be stamped with a 2s. 6d. adhesive judicature stamp, as required by the Order as to Supreme Court Fees, 1884, Rule 107. Stamps can be obtained at Rooms 6 and 419, Royal Courts of Justice; at the District Registries of the High Court; and at all head post-offices in England.

The only information which (subject to the conditions hereinbefore mentioned) it is in the power of the Assistant Paymaster-General to furnish, is—

- (a) The amount of the fund in Court.
- (b) The date of an Order of Court affecting the account (if any) other than that noted in the last column of the *Gazette*.

Funds in Court can only be dealt with under the direction of an Order of Court. The Assistant Paymaster-General cannot advise applicants respecting the proper method of applying to the Court for such an Order.

No notice can be taken of applications unless the foregoing instructions are complied with.

Especially bear in mind that the Assistant Paymaster-General is not under any duty to assist you in finding out whether you are or are not entitled to the money. **You must prove your claim in Court to a**

Judge. The Paymaster-General will doubtless be pleased to write a cheque for you if the Judge orders it.

A word to the wise. A judge requires **strict proof** of identity before he orders money to be paid out of Court. And where the claimant sets himself up to be the heir or next-of-kin of a person long deceased, the judge requires very strong evidence. Mere similarity of name is of little value. And I have always found in these pedigree cases that there is one link in the chain weak or altogether missing. Thus:—You claim to be of kin to Alan Thomas, who died in 1800, and to whose credit a sum is lying in Court. You trace Alan Thomas, and find that he had three brothers and a sister, John, James, William, and Eliza. You can prove that your own great-grandmother was a certain Eliza, whose maiden name was Thomas, and that she would correspond in age with Alan's sister Eliza. But you must go much further than this. You must prove absolutely that Eliza Thomas, your great-grandmother, was *the* Eliza Thomas, sister of Alan. A "moral certainty" is not enough. A strong probability is not enough. You must have legal proof from which no reasonable man could draw any other inference than that your great-grandmother and Alan's sister were one and the same.

In such cases as these, however, the Court admits evidence of a kind not admitted in other cases. Thus, old family letters, entries made by your forbears in Family Bibles, inscriptions on tombstones or mural tablets, and even statements made by your dead relations will carry some weight. Thus, you can say, "I often heard my grandmother, who was called Sarah, speak of her uncle Alan, and say that he was a very rich man who lived in Wales." I do not say that such evidence will carry much weight; but it is admissible in a case of pedigree, though what your grandmother said would not be admissible in any other kind of case.

Another word to the wise:—Do not pay any attention to agents, not responsible solicitors, who pretend to be agents of the Court of Chancery, or next-of-kin agents or what not, who tell you that there is money in Chancery which is probably yours, and bleed you for fees. These men are mostly rogues in grain, who ought to be made acquainted with the inside of a gaol.

And do not run away with the idea that because you happen to be of the same name as one of the people mentioned in the list, that you therefore stand a ghost of a chance.

There is **nothing much more unprofitable** than the pursuit of money in Chancery. Dozens of people have wasted their means and their lives at the game of hunting unclaimed funds; and though one in a hundred may get something in the end, the other ninety-nine find themselves baulked and disappointed. I have known some of these claimants who, had they expended in some honest trade or calling half the patience, perseverance and ingenuity they displayed in hunting up a pedigree, would have made fortunes and benefited the race. Most of these people have been buried at the expense of the parish. It is a sad story. Let us ring down the curtain.

When property is without an owner, the Crown has a right to it. Perhaps I should say that when anybody dies without leaving an heir or next-of-kin, the Crown takes the property; for the Crown is the ultimate heir. And thus



it has come to pass that large sums of money and large areas of land have become Crown property. In some cases, when a man dies it is possible to say with certainty that he has neither heir nor next-of-kin. Take, for example, the case of a man who was born illegitimate, and has never married. Such a man cannot possibly have a successor to his property unless he has made a will. For an illegitimate person has no ancestors. Legally, even his own mother is no relation to him. His only possible relatives are his own descendants; and if he never married, no descendants would he have. So that on his death, if he should not have troubled to make a will, all his property would go to the Crown. And even if he had made a will, but had left some of his property undisposed of, the Crown would take the undisposed-of portion. There are other cases where the Crown steps in; namely, when, although it is not certain that the deceased left no relations, yet no relation puts in an appearance to claim the property.

It is of the last-mentioned kind of case that I wish to say a few words. The Crown takes out letters of administration in the name of the Solicitor to the Treasury. That gentleman has to perform the duties of an administrator—to defray funeral expenses and debts of the deceased, and hand over the balance to the Lords of the Treasury for the service of the Crown. Sometimes, after the Crown has administered the estate, somebody comes forward and claims to be the next-of-kin of the deceased; and if that somebody can prove the relationship, the property will be handed over. I have known and heard of many attempts to claim property in such circumstances; but I never knew anything to come of them.

It may be, however, that you are one of the lucky people for whom the Treasury has been taking care of an estate, and you want to know how to get the property into your hands. In the first place, before going to any further expense, you had better make exhaustive inquiries and procure evidence that you are related to the deceased owner of the fortune. And I strongly advise you to lay this evidence before a solicitor and counsel, and ask their advice as to whether the chain of evidence is strong enough to prove your case. Because you must remember that it is not for the Crown to prove that you are not entitled, but for you to prove that you are. And beware of the weak link. You may have formed a very ingenious theory to supply the place of the missing link, but ingenious theories do not count for much.

Assuming that you have a pretty strong chain of evidence, your next step is to present what is called a petition of right to the Sovereign. This is equivalent to raising an action against any other person. You cannot bring an action at law against the Crown, but if you think you have any claim, you can petition the Sovereign to do you justice. So you write out your petition, setting forth as concisely as possible the facts upon which you base your claim, and winding up with a humble request for the fortune to be handed over to you. This petition must be forwarded to the Home Department, Whitehall, and the Home Secretary will lay it before the Queen. Her Majesty writes upon it "Let right be done"; and as the only

possible way of letting right be done is to have your claim inquired into, your petition will be remitted to the Courts and the case will proceed before a judge in the ordinary way. When the day of trial arrives, all that you have to do is to prove to the judge that you are next-of-kin or heir of the deceased, and he will make out an order declaring you to be entitled to the property.

At one time it would have made no difference to you how long ago your alleged relative died. Nowadays, however, you must make your claim within twenty years of the time when the Solicitor to the Treasury took out the letters of administration.

In all these cases of money in Chancery and unclaimed (or, as they are sometimes called, "Dormant") funds in the hands of the Crown, the **difficulties of proving a pedigree** are enormous. But they are not so great as some people think. For example, I have met people who imagine that unless you can produce a marriage certificate, you cannot legally prove the marriage of the persons whose marriage you wish to prove. This is not so. To begin with, if A and B are living together as husband and wife, it is presumed that they are married unless the contrary is proved. By "living together as husband and wife," I mean that the man and woman cohabited together; that the man was in the habit of calling the woman his wife; that neighbours used to address her as "Mrs. A" without being contradicted. If you can prove these things, it will be very difficult for anyone to upset the legal presumption that the parties were married; unless he can show that at the time he or she was married to somebody else; for the law assumes, to begin with, that people have acted properly. And again, to require strict proof of a marriage (*i.e.* the certificate, or somebody who was present at the ceremony), might work enormous hardship. For instance, the parties might have been married abroad, where no certificates are issued; or they might have been married under false names. So that if you wish to prove a marriage, you must either get the certificate, with evidence that the persons referred to "as having been married" are the persons whose marriage you are trying to establish. Or you may produce evidence of neighbours who say, "The two persons in question lived together as man and wife. She was always reputed to be his wife, and so acknowledged by him." Or, again, you can adduce evidence of relations of either husband or wife, who say that they have been told by members of the family, since deceased, that these two were married.

**Birth and Legitimacy** can also be proved by similar evidence, without producing the birth certificate. And it should be remembered that if I produce my birth certificate it proves nothing, except that a child named "Peter Blank" was born on such a day of such-and-such parents. I have further to prove that I am the Peter Blank referred to in the certificate. It is much the same in proving the **death** of a person.

And in cases of pedigree, especially when the matter concerns landed estate, it is often a point of importance to prove seniority. For if I claim that I am heir to the land of my uncle, I have to prove (1) my grandfather's family, of whom it consisted; (2) that my father was the eldest in [England]



brother of my uncle, or the eldest who survived him leaving issue; (3) that my uncle, when he died, had no children or other issue—either because he never married, or because he had no children, or because all his children, and their children (if any) died before him; (4) that my uncle's father [in England] died before my uncle; (5) that I am the eldest or only son of my father.

There was a very curious case once in which three boys were all born at a birth; and in after years a dispute arose as to which was the eldest. In fact, the question was just such a one as I have been putting to my readers. Now these three boys answered to the names of Stephanas, Fortunatus, and Achaicus; and it was shown that the father had often been asked why he chose names so extraordinary for his children. To which he used to reply that he took the names from the First Epistle of St. Paul to the Corinthians (*see* ch. xvi. v. 17); and that Achaicus was the youngest. Then came the question which of the other two, Stephanas and Fortunatus, was the elder. And a witness was called to prove that she had heard the aunt of the three, who was present at the birth, say that she had tied a string round the arm of number two, to distinguish him from the other. And it turned out that this one, round whose arm the string had been tied, was Fortunatus.

There is a similar difficulty—nay, a greater difficulty—in proving which of two persons died first when they both perished in the same catastrophe. Thus, father and eldest son go out to sea together; a storm arises, the ship founders, and the two of them perish in the waves. It may be very important to know which of the two died first. For example, if the father died first and the son survived him one single second of time, the son is the father's heir, the father's landed and heritable property vested in him, and will consequently go to the persons whom he named in his will; or if he died married and intestate, his widow will take her third for life. If the son died first, on the other hand, his widow will take nothing; nor will his last will and testament affect the property which was the father's.

Now, the rule of law is this: "He who asserts must prove." So that if the son's widow, for instance, comes forward to claim a share of the land which belonged to her husband's father at his death, she must necessarily assert that her husband (the son) survived the father. And as she asserts this, she must prove it. On the other hand, if it is to anybody's interest to assert that the son died before the father, that person must prove his or her assertion. In such a case as I have described, as a rule it will be held that for the purpose of disposing of the father's estate, the father survived the son. But for the purpose of disposing of the son's estate, it will be held that the son survived the father. These contradictory conclusions are simply arrived at because it is impossible to prove the real truth.

## Book VI.

### THE LAW OF THE CITIZEN.

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#### CHAPTER I.

##### THE FRANCHISE.

The Parliamentary franchise—Before 1832—Difference between counties and boroughs—Counties—Freeholders—Leaseholders—Occupiers—Householders—What is occupation?—Householder means resident—A man resides where he sleeps—An "occupier" must occupy to the value of £10—Householder's franchise; value no matter—A "house" is any place used as a separate residence—Flats—Apartments—Lodgers—Doubtful cases—Exclusive use of £10 worth of room—Paying guests—Son living at home—When he is a lodger—Joint lodgers—Joint occupiers—The service franchise—Master must not live on the premises—Occupation in succession—Boroughs—Same as counties except no ownership vote—Paupers disqualified—Municipal and County Council electors—No ownership vote—Occupation and residence required for burgess qualification—Successive occupation—Of different premises—By different persons—Unmarried women can be electors—District and Parish Councils—All municipal and parliamentary voters vote in county districts—Burgesses only in town districts—Parochial electors—Who are they—Full woman's suffrage—When a married woman can vote—Registration—Claims, time of—Objections—Difference between old and new claims—Lodger's claims must be signed personally—And verified by a witness.

IT is not my intention here to treat of the franchise in the manner of a politician, but simply as a lawyer. That is, I wish to inform you what the law is with regard to voting at elections. There are several kinds of franchise, varying according to the body to which representatives have to be elected. These bodies are—Parliament, Municipal Councils, County Councils, Rural District Councils, Urban District Councils, Boards of Guardians, Metropolitan Vestries, and School Boards. And first let us consider the

##### PARLIAMENTARY FRANCHISE,

which will be better understood if treated historically.

Before the Reform Act of 1832, the franchise in counties differed radically from the franchise in cities and boroughs. By an Act of Parliament of Henry VI., the right to vote was limited in counties to forty-shilling freeholders; that is, to persons who possessed a freehold estate of the value of forty shillings a year. It must not be thought that this law restricted the franchise to landowners in the ordinary sense of the word. For it was customary at that time to let farms on leases not for a fixed period of years,



but for a life or lives. Thus, Farmer Giles would take a lease of Woodacre farm for the lives of John Jones and John Jones's son Thomas, and his grandson William. This would be a lease for three lives; and Giles would keep the farm so long as any one of the three persons named continued to live. And as a tenant for a life or lives is a freeholder, Giles would have a vote for the county. But had he taken a lease for a fixed number of years, however long (say, 999 years), he would not have been the freeholder, and would have had no vote [in England].

In the cities and boroughs, however, the pre-Reform Act franchise was of a highly varied kind. Hardly any two towns elected their members on the same kind of voting list. The persons entitled to vote derived their right either from the Royal Charter of Incorporation, or from the custom of the borough. In some places, all who paid scot and lot—that is the local rates; in one town, all who had lived in the place long enough to boil a pot; in others, all males of full age born in the town of free parents and in lawful wedlock, or who had married wives born in the town, were accorded the privilege. On the other hand, quite distinct from these democratic constituencies, there were boroughs where the only qualification was a property qualification, and other places where the town council elected the members of Parliament.

The Reform Act, in substance, widened the basis of the county franchise and rendered uniform the franchise in boroughs and cities. The forty-shilling freeholders were allowed to remain; and they remain to this day, provided that they have an estate of inheritance, or an estate for life or lives which came to them by a will, or marriage, or marriage settlement, or promotions to a benefice or office—*e.g.* a parson in respect of the vicarage or glebe land. Again, a forty-shilling freeholder who occupies the freehold himself has a vote. To them were added in the counties copyholders and holders of real property of all kinds for a life or lives or larger interest of the annual value of £10, whether in occupation or not. This was reduced to £5 by the Representation of the People Act, 1867. For the first time leaseholders were admitted. They were divided into two classes—those who held a lease of property of the annual value of £10, when the lease was originally for sixty years or more; and those who held leases of the annual value of £50, the lease being not less than twenty years. Besides that, there was the famous Chandos Clause by which were included all *bonâ-fide* tenants in occupation of a house liable to a rent of £50 a year. The Disraeli Act of 1867 reduced this occupation franchise for county voters from a rental of £50 to a rateable value of £12. The Gladstone Act of 1884 applied to counties some of the provisions which had been applied to boroughs by the Act of 1867. In the first place, all persons occupying lands or tenements in the county of the rateable value of £10 a year were accorded the franchise. So also were all inhabitant householders whose houses were rated to the relief of the poor.

I wish you to notice the **difference between the occupation franchise and household franchise.** A man occupies premises when he has control of

them and uses them, or is in a position to use them, exclusively. He inhabits premises when he uses them as a home. To entitle anyone to vote as an inhabitant, he must sleep in the place. I do not mean that he need always sleep there; it is enough if he sometimes sleeps there, and is entitled to sleep there when he likes. So that a man may have more than one dwelling-house, enough to entitle him to the household franchise in each place. Thus, if I have a house in London where I generally sleep, and a house at Brighton where my family resides, and where I go from Saturday to Monday and sometimes in the middle of the week, I can claim a vote as an inhabitant both of London and Brighton.

A curious case was one which was decided a great many years ago, where a man was in an employment where he always had to work late into the night. He had a bed provided for him at the place where he worked, and used to take a nap every night for an hour or two and then go to Mildenhall, where he had another bed, and there finish his rest. It was decided that he resided at Mildenhall, and not at the place where he took his nightly nap.

Occupation applies, for instance, to business premises where one does not reside. Thus, I occupy my chambers in Lincoln's Inn, which I use for business purposes. The City merchant occupies his offices and warehouses in the City, and lives out at Sydenham or Hillhead. And he has an occupier's vote for his City premises, provided that they are of the clear yearly value of £10. He has a vote for his residence quite regardless of the value of the house. "Clear yearly value" is the same as rateable value—that is, the rent that a tenant would pay who had to do all the repairs and pay all the outgoings, including rates and taxes (*see* Book II., Chapter IV., p. 225).

It is necessary both for the occupation and the household franchise that the premises in respect of which the vote is claimed should be rated. It is not necessary, however, that the person claiming to vote should himself pay the rates. Thus, in the case of flats in London, the rent is generally inclusive; that is, the landlord pays the rates. And this is the case, too, in small working-class houses. Nevertheless, the tenant is entitled to his vote in each instance. Again, the poor rates and assessed taxes for these premises must have been paid up to the 5th of January in the year when the register of votes is made up. And such rates must have been paid on or before the 20th of July.

**Who is a "householder"?**—Which leads to and depends upon the answer to a further question—"What is a dwelling-house?" The question to decide is whether there is a separate occupation of a building or part of a building as a dwelling. There need not be a structural separation of the building into parts to make one building into several dwelling-houses for the purpose of the franchise. The question often arises when one house is let out in rooms, or suites of rooms or floors, to several persons, whether those persons are inhabitant "occupiers" or lodgers—an important practical distinction. Sir N. Lindley (afterwards Master of the Rolls) points out more clearly than does any other judge the essential difference:—"It appears to me that when a house is wholly let out in unfurnished apartments, separately occupied by tenants, and the landlord does not reside in the house, and has no servant in the house to look after it for him, the tenants are rateable (*i.e.* they are occupiers) and not lodgers." There is, in fact, no



difference between a house of four storeys let off each storey to one tenant (or each room to one tenant, for that matter), and a building consisting of four separate flats. The point is—Does the landlord retain control of the building? Does he, or does a servant for him, remain on the premises to look after the place? If so, the tenants are lodgers. If not, they are householders.

The importance of the point is seen when one looks at the **lodger franchise**. For a lodger can only claim to be on the voting list when he occupies lodgings of the value of £10 a year unfurnished; while a householder, so long as he occupies rateable premises, need not trouble his head about the value of these premises. So that if you occupy a room of small value, it may make all the difference between enfranchisement and disfranchisement whether you occupy that room as a separate dwelling or as a lodging. One of the best distinctions drawn between tenants and lodgers is that drawn by Lord (then Mr. Justice) Hannen:—"Probably it may be said, with accuracy, that where the landlord himself resides in the house the other inmates are lodgers, because they submit themselves to his control; but where the landlord does not reside in the house, or where he occupies a separate set of rooms in the basement, or where the house is divided into separate or independent dwellings, or into separate flats with a porter, or, as it happens abroad, with a *concierge* living upon the premises, in each of these cases, even although a servant of the landlord may be present, the separate occupation exists which is necessary to constitute a *tenancy*." It is always a question of fact whether the landlord retains such a control over the premises as to make the occupiers his lodgers.

In dealing with lodger claims, there is always a certain number of **doubtful cases**. The first head of doubt may be discussed in answer to the question—Is the lodging **worth £10 unfurnished**? The test of value is rent. And this is a conclusive test where the lodgings are let *bonâ-fide*. When it is a son qualifying as a lodger in his father's house, the revising authority is apt to look with a little suspicion on the rent paid. In a case decided in 1892, Mr. M'Crea, who lodged in an Irish village, paid £12 a year for two unfurnished rooms in a small house which was only rated at £2 15s. a year. It was argued that if the whole house was only worth £2 15s. a year, two rooms in it could not be worth £12. But, Mr. M'Crea replied, "They are worth £12 to me, because they are practically the only lodgings available for me in the village." And the Court upheld this view. There was no reason to suspect that Mr. M'Crea was paying a higher rental than he could help merely for the purpose of getting a vote.

The next point is, has the lodger the **exclusive use** of a room or rooms of the prescribed value? Let me take an example of the doubtful kind. William Brown hires lodgings at the house of Mrs. Gamp at the rate of fifteen shillings a week. In return for this he is to have a bedroom for himself and the use of a sitting-room, which is enjoyed by him in common with Mrs. Gamp and her family and the other lodgers. The bedroom as well as the sitting-room is furnished, so that the use of the furniture is included in the fifteen shillings. There is also included attendance, light, and the cooking of Mr. Brown's breakfast, tea and supper. Now, Mr. Brown has no claim to a lodger vote unless the value of his bedroom unfurnished and without attendance, lights, etc., is £10 a year—about 3s. 10d. a week. Now, it is to be

assumed that Mrs. Gamp is obtaining full value for her lodgings. The law trusts her to do that. And further, it is to be assumed that Mr. Brown is not paying more than the accommodation is worth to him. That is, you must assume that fifteen shillings a week is the true value of the bedroom, use of furniture, use of sitting-room, the cost and trouble of cooking the lodger's meals, the bother of waiting upon him, and the gas or candles that he consumes. Now, if you deduct the value of all these advantages, you get down to the naked value of the bedroom—if I may borrow the phrase, the "prairie" value.

You have a further difficulty when the lodger is of the kind known as a paying guest—that is, where he pays a lump sum for board and lodging. In a case of this kind you have again to deduct from the lump sum the value of the board, use of the furniture and so on, and get down to the bare value of the room or rooms of which the paying guest has the exclusive use. In London, if the paying guest has the right to the exclusive use of any room, it may safely be assumed that the value of that room is sufficient to qualify him for a vote; for I should say it would not be possible to obtain an unfurnished room as lodgings in any part of London at less than four shillings a week.

Now let us take a case of considerable difficulty: the case, I mean, of a **young man living at home with his parents** and contributing some of his earnings to the support of the household. Say that he pays £1 a week, and receives in return board, lodging, washing, and practically everything except his clothes. As a rule, the difficulty here is not so much as to value—it is as to whether the son is a lodger at all; or, rather, as to whether or not he has such a contract with his parents as entitles him to the exclusive use of any room or rooms in the house. We all know that when there is a large family and a small number of bedrooms, two sons will sleep in the same room. If this is the case, there is obviously no exclusive use. But it may be that the "lodger" son has a room which is called his bedroom, and that he has it all to himself as a rule. But at the same time, if a visitor comes to stay for a night or two, this room might have to be given up to the visitor, or one of the other sons would be turned out of his bedroom and put into that of the "lodger" son. This is the most usual kind of case; and it is for the "lodger" son to prove that he has a right to his room, and that his giving it up for a night or two, or sharing it occasionally with some other member of the family, is only an act of courtesy on his part. In other words, he has to show that he is the same as any other lodger; that his permission had to be asked before his exclusive use of the room was temporarily disturbed; that, in fact, his parents could not have required him to vacate the room or share it as a matter of right. Now we know that as a rule when a son lives at home in this way his parents have not the remotest notion of permitting him to appropriate his bedroom to himself if the convenience of the household should demand that other arrangements be made. I say, therefore, that a son living with his parents will have some difficulty in proving himself to be a lodger having the exclusive use of a room within the meaning of the Franchise Acts.



Now let us take the case of **joint lodgers**. By joint lodgers I mean two or more persons who take rooms together. Thus, when I was a student, a fellow student and myself hired three rooms for ourselves exclusively. He had one bedroom, I the other, and we used the third room in common as a sitting-room. We did not always keep to the same bedroom. That is, sometimes I slept in the back bedroom and sometimes in the front. To put it in definite form, we two had the exclusive use of three rooms; but as between ourselves neither of us had the exclusive use of any room. We were entitled to vote as lodgers; and I will tell you how the claim was made out. We lumped the value of our three rooms together, and made out the value of them, furnished, to be £2 10s. a week (£130 a year). We deducted £80 for the use of the furniture, plate, etc., and attendance, which were all included in the £130. This left £50 as the value of the three rooms unfurnished—£25 a year for each of us. Now, the law is that when two or more lodgers take rooms jointly, and the value of the rooms averages £10 a year for each of the joint lodgers, two of these lodgers can vote. To put the case quite plainly, if three persons hire three unfurnished rooms at £25 a year, none of the three can have a lodger vote. For the value of £25 amongst the three of them gives only £8 6s. 8d. each. And it will be of no avail for one of the three to prove that he contributes £15 a year, and the others only £5 each. The rule is absolute. The joint lodgers must pay to the landlord a total rent making an average of at least £10 a year each; and it makes no difference, one way or the other, how they subscribe the total rent amongst themselves.

In the same way, joint "**occupiers**" (*i.e.* not resident householders, *see* p. 1017) of any land or building can claim if the value of the land or building is sufficient to allow £10 a year for each. Thus, the common practice amongst barristers is to share a set of chambers. Mr. Hiphee, Q.C., Mr. O'Rater, and Mr. Stuffe jointly occupy a set of three rooms in New Square, Lincoln's Inn, paying a rent of £80 a year to the Benchers of the Inn. One room is used by the clerk and the junior clerk (who objects to being designated "boy"), and in these servants the three learned counsel have each an undivided third. Mr. Hiphee uses the front room, Mr. O'Rater the back room, and the youthful Stuffe oscillates between the two. He has "the run of the chambers." Now, splitting up the total rent, you have £26 13s. 4d. a year per tenant. Two of them can be registered as electors. The unwritten law of the Bar is that the two senior men in the chambers exercise the franchise on behalf of the chambers.

There remains to be considered the **service franchise**, which was introduced by Mr. Gladstone's Act of 1884—the Act which fixed a uniform franchise (except the "ownership" vote) for counties and boroughs. The service franchise arises when a person occupies a dwelling by virtue of holding some office, service, or employment. He pays no actual rent, but his residence is included as part of the emoluments of his office, service, or employment. The dwelling must be a separate one; that is, it must not be part of the master's house. Thus, a coachman who lives at a lodge or cottage on his master's estate will have a vote; and even if he has a couple of rooms over the stable, as happened in one

case. But if he has a room in the master's house, he is not entitled to be an elector.

In all the cases of franchise depending on residence or occupation of premises, the premises must have been occupied or resided in for a full twelve months up to 15th of July prior to the making up of the register. This applies to occupiers, resident householders, lodgers, and service voters. There are, however, one or two exceptions, known as **occupation in succession**. This arises when an occupier or resident householder, who began the twelve months in one house, office, or other building or land, moves to another qualifying property in the course of the year. He is allowed to remain an elector, his two occupations counting as one. Of a like nature is the case of a lodger who changes his room or rooms during the year. If he removes to another house he loses his qualification; but he does not lose it merely by changing his room for another apartment in the same house.

The **suffrage in boroughs** is now similar in many respects to that in county constituencies. The main differences are that there is no property qualification, and that in a few cases some of the peculiar old pre-Reform Act franchises remain. For example, the Liverymen of the City of London vote in the City whether they live there or not. But for practical purposes the voting list in the boroughs is made up as follows:—

- (1) Resident householders (*see* p. 1017).
- (2) Occupiers of buildings or lands of £10 annual value (*see* p. 1016).
- (3) Lodgers whose lodgings are of the value of £10 a year unfurnished (*see* p. 1018).
- (4) The service voters (*see* p. 1020).

As in the counties, the voter must have resided in or occupied the qualifying premises from the 15th of July to the 15th of July. Again, successive occupation is allowed in the same way both in boroughs and counties.

**Rates.**—As I have already indicated, the property out of which the voter derives his qualification must be rateable. And unless on or before the 20th of July the person liable to pay the rates has paid everything due up to the 5th of January previous, no name will be allowed on the list of electors in respect of that property. This objection applies whether in counties or boroughs. Another objection which also applies all round is pauperism. For it is the law that anyone who has been **in receipt of parish relief or alms** during the specified twelve months shall not be allowed on the voting list. The word "relief" refers to a payment made out of the rates. "Alms" is a more ambiguous term. Literally, it would mean that any one who had accepted a charitable contribution towards his support would be debarred. But it does not mean this. The alms which disqualify the recipient from this privilege of citizenship must come from some fund which forms part of the public money of the parish for relief of the poor. By special Statute, a man who receives medical attendance or nursing for himself or his family, or who sends his child to a free or an endowed school, is not to be considered as a recipient of alms.

The rating requirement was first introduced into the electoral law by the



Representation of the People Act, 1867; and the "parish relief or alms" disqualification by the Reform Act, 1832. But in point of fact, both the rateable qualification and the pauper disqualification had been in existence for hundreds of years. For in many boroughs before 1832, the qualification was that of paying "scot and lot"—that is, all local burdens. And the custom had sprung up in most towns of disallowing the votes of those who were in receipt of alms or relief. There was no such custom in the counties, because the only county voters were the 40s. freeholders; and it was assumed that a man who had a freehold estate worth 40s. a year was not a pauper. In fact, the old Act of Henry VI. restricted the franchise to 40s. freeholders on purpose to take the elections out of the hands of "a multitude of men of no substance."

#### THE MUNICIPAL AND COUNTY COUNCIL FRANCHISE.

County, City, and Town Councils are elected by electors who possess similar qualifications. In fact, the effect of the Local Government Act, 1888, commonly called the County Council Act, bears the same relation to local government that the Representation of the People Act, 1884, bears to parliamentary government. The effect of each Act, roughly speaking, is to extend the franchise in the counties to the same limits as the franchise already existing in the boroughs.

The election of Municipal Councils is in the hands of the **Burgesses**. Who are they? It would be interesting in this place to trace the growth of the municipalities of Great Britain—to show how, partly by guile, partly by bribery, partly by force, they extorted from the kings and barons of the Middle Ages charters exempting the burgesses from the servitude under which the rest of the commonalty laboured. It is sufficient here to indicate that the boroughs of old England and Scotland did acquire important privileges for their burgesses, and that therefore it was much more than a matter of sentiment for a man to be a burgess of an important town. And the admission to the burgess roll was jealously guarded. In some towns the only burgesses were those who were born in the borough of burgess fathers. In others, citizenship could be acquired by servitude—that is, by serving an apprenticeship in the city. In others, the only full citizens were the members of certain recognised guilds (*see* p. 762)—London, for example.

So that each borough admitted its burgesses in its own way and on its own principles. And as some of the qualifications became almost obsolete, the management of local affairs in many towns fell, comparatively speaking, to a mere handful of men. In fact, local government lapsed into much the same state as parliamentary government. Then came the Municipal Corporations Act, 1835, which placed municipal franchise on an equal footing all over the country. Since that time the **burgess qualification** has been uniform. Every person of full age, except a married woman, who from the 15th of July in one year to the same date the next year, occupies either solely or jointly with someone else a house, warehouse, counting-house, shop, or other building in the borough, or land of the annual value of £10, is a burgess. But this condition is added: that he or she must, during the qualifying

twelve months, reside in the borough or within seven miles of it. The qualifying property must be rated and the rates paid before the 20th of July, just as in the case of the parliamentary franchise (p. 1021); and the receipt of relief or alms disqualifies the recipient.

I ought, perhaps, to explain that it is the receipt of relief or alms during the qualifying period which disqualifies from the electorate. I have known instances in which people have been under the impression that the receipt of parish relief at any time prior to the election disqualifies the voter. Suppose a burgess has lived in the borough from the 15th of July, 1897, to the 15th of July, 1898, without receiving alms or relief. He is entitled to be put down on the voting list when that list is settled by the overseer at the end of July. The list is finally revised and passed in October, and comes into force in the following January. All elections in the town take place on the basis of that list until a new one comes into force twelve months later. Suppose the burgess in question has become a pauper between the 15th of July, 1898, and the coming into force of the next list in January, it makes no difference to his right to vote. In other words, so long as he was put on the list in 1898, he can vote at any election until that list is superseded by a new one.

**Successive occupation** is good occupation for the purpose of the burgess list. Thus, if I live at No. 1, Broad Street, Bristol, from the 15th of July, 1897, to the 15th of August, on which date I remove to No. 6, West Street, Bristol, and there I live till Christmas, and again I remove to No. 8, East Street, Bristol, and live there until the 15th of July, 1898, I can claim to be a burgess on the strength of successive occupation of the three houses.

There is another kind of successive occupation for burgess purposes, and that is, **successive occupation by different persons**. When one succeeds to the occupation of property by having it left by a will, or by virtue of a marriage settlement, or marriage, or descent, or promotion to a benefice or office, he can add his predecessor's title to his own and so qualify. Thus, my father lives in a house of his own at Plymouth from the 15th of July, 1897, to the 24th of December in the same year. Then he dies, leaving the house to me, and I live in it until the 15th of July, 1898. I can claim to be enrolled on the Plymouth burgess list.

I would have you note that **single women and widows** can be burgesses on the same terms as men.

**County Council electors** must have the same qualifications as burgesses in boroughs (*see ante*, pp. 1022-3).

#### DISTRICT AND PARISH COUNCILS

are elected by an electorate differing slightly from the parliamentary, municipal, and County Council electorate. There is a slight difference here between those District Councils within the area of a borough and those not within a borough.

When a District Council is within a borough, the electors are those persons on the burgess roll of the borough; but when the District Council



area is **not within the area of a borough**, the electors are the same as those who vote at a parish meeting or for a Parish Council. And the persons who have the right to elect a Parish Council or to vote at a parish meeting are called

**Parochial electors.** And who are they? Well, they are all the persons within the parish who are on the parliamentary register or on the municipal or County Council register in respect of premises within the parish. This includes non-resident owners of property as well as occupiers, resident householders, lodgers and service voters. In one respect the parochial franchise is wider than any other; and that is in the direction of female suffrage. For the first time in the history of Great Britain, **married women** have been admitted to the poll as parish electors. I have told you on page 1022 that a widow or single woman may possess the burgess qualification.

The Local Government Act, 1894, when it defines the parochial elector, says that a woman shall not be disentitled simply because she is married. This means that if a woman would be entitled to be an elector provided that she were a widow or spinster, she shall be entitled notwithstanding that she has committed the offence of matrimony. Now, no woman could ever be entitled to a parliamentary vote; but only to a local government vote. So that for a married woman to qualify as a parochial elector she must possess the burgess qualification. It comes to this, that a married woman can never be a parochial elector on an ownership qualification, nor on a lodger qualification, nor as a service voter. She must claim, if at all, as an occupier within the meaning of the Municipal Corporations Act. She and her husband cannot both vote in respect of the same property. Thus, if my sister and I hire a house between us, and take a lease or make an agreement in our joint names and occupy the house jointly, we can claim as joint occupiers, provided that the house is worth at least £20 a year (*see* p. 1020). But if my wife and I take a joint lease of a house, even though the rent is £100 a year, and we each pay half the rent, we can never claim as joint occupiers. She can be on the list, or I; but not both of us. The kind of way in which married women become parochial electors is this:—Mr. Jones is a commercial traveller, residing with his wife at Chalk Villa, Mugton. In the High Street of the same village Mrs. Jones carries on a separate business as a milliner, the milliner's shop being taken by her. She can and ought to be enrolled on the parochial electors' list as the occupier of the shop. You see, if she were a widow or single woman she would be entitled to vote for the Town Council or County Council in respect of her occupation of that shop.

#### REGISTRATION : CLAIMS : OBJECTIONS.

It is the duty of the overseers of every parish to make out at the end of July in each year a list of the persons entitled to vote at the different elections in respect of the ownership or occupation of property within the parish. The list of occupiers and owners must be made by the overseer himself upon information gathered by himself. I mean that he ought to put

down all owners and occupiers who are entitled without their making any claim. But lodgers must always claim every year. Old lodgers must send in a notice of claim before the 25th of July, and new lodgers between the 31st of July and the 20th of August. The difference between an old lodger and a new one is that an old lodger will be put on the list unless his claim is successfully objected to ; while a new lodger must attend the Registration Court and prove his qualification.

An occupier or owner should always take the trouble to look out for the lists posted on the doors of his church early in August and see if his name is there. If it has been omitted, let him send notice of his claim to the overseer on or before the 20th of August. Again, he may have ceased to occupy his old premises and removed to new ones between the 15th of July of the previous year and the 15th of July in this year ; and in such a case he should send in his "successive occupation" claim on or before the 20th of August. Such a claim must describe all the properties successively occupied within the qualifying period.

**Objections** can be taken against any would-be elector by anyone who is himself an elector. When it is intended to object to a person already on the list, notice in writing must be sent to that person and also to the overseer. Send it by registered post. The notice of objection *must* state the grounds upon which you object—not formally, but with sufficient accuracy to enable the claimant to understand what you mean, and to enable him to be ready with evidence to meet the objection. The notice must be sent not later than the 20th of August.

As to **new claims** of all sorts (not old lodgers) no notice of objection need be given. Any elector can appear at the Registration Court and give notice of objection then and there, and is entitled to cross-examine the claimant.

It is not a wise proceeding to object to an old elector unless you are particularly sure of your ground. For if you put him to the trouble and expense of appearing at the Revision Court to defend his right, and he succeeds in defending it, you are liable to be ordered to pay his costs and expenses.

I ought, perhaps, to have said that a **lodger's claim must be signed by the lodger himself**, and witnessed by somebody else. The claim must be accompanied by a declaration made by a person who knows the facts, to the effect that the statements made in the claim—*e.g.* as to length of occupation, value of lodgings, etc.—are true. It is a common practice for enthusiastic party agents to send in lodger claims and themselves sign them with the lodger's name. Such an act may be, and sometimes is, morally innocent ; for occasionally somebody will call at the party headquarters and ask the agent to make a claim for him. But whatever may be the moral complexion of the act in a particular case, it is always an offence against the law ; and he who does it is liable to be sent to gaol. *Verb. sap.*



## CHAPTER II.

### VARIOUS PUBLIC OFFICES; AND THE ELECTION THERETO.

**Members of Parliament**—Disqualifications—Aliens—Minors—Persons holding offices—Clergymen and priests—Convicts—Bankrupts—Persons guilty of corrupt practices—Lunatics—Former disqualifications—Coke's little objection—Mayor, alderman, and councillor—Qualifications for councillor—Occupation and residence—County councillor—Disqualifications—Clergy and ministers; but not for County Council—Regular officers on the active list—Corporate officers—Contractors—Disqualified by a shilling's worth of stationery—Some contracts do not disqualify—Difference between municipal and county councillors—Bankrupts and insolvents—But may obtain a certificate of misfortune—Baillies and provosts—Provost or bailie must be a councillor—Mayor or alderman need not be—The office and dignity of mayor—The office of alderman—A bailie is more important than an alderman—Corrupt and illegal practices at elections—Corruption—Bribery—What it is—May be only a promise or an offer—Or giving or lending money to others for bribery by them—The case of "bottling"—Corrupt payment of rates for another—The person bribed is guilty of bribery—Not necessarily a personal benefit to the voter—Treating—Both treater and treated are culpable—Personation—How a man can personate himself—Undue influence—Threats of temporal or spiritual harm—Tricks—Duress—Illegal practices—Excessive expenditure—A maximum fixed in Parliamentary and municipal elections—Paid agents—When allowed—Must not vote—Hired committee-rooms—Paid advertising must be done through a regular advertising agent—Bands and cockades—Hat-cards at Walsall—Punishment of corrupt practices—Fine and imprisonment—Disqualification from voting—And from being elected—Candidate personally guilty—Illegal practices punished by fine—And certain disqualifications—Certain excuses are allowed—Inadvertence and absence of bad faith—How to obtain exemption from consequences—What is a "trivial" case—When an election commences—The Lichfield case—The Haggerston case—Expenses incurred by political associations—The Hexham case—A dear picnic—Associations not political—Question whether they are controlled by the candidate—Independent committees—Parish and District Councillors—In both cases must be parochial electors—Or (in England) qualified by residence—The chairman—Disqualifications for office—School Boards—Are women eligible?—The chairman—Nominations—Compulsory acceptance of office—Except parish (and perhaps district) councillors—Fines on resignation—Withdrawal of nominations—Persons exempt from serving in local offices—Mental or physical infirmity—Old age—Certain professions.

**Members of Parliament.**—It is one of the highest and most legitimate ambitions of a British citizen to represent his fellow-citizens in the House of Commons. The qualifications of a candidate are few. First, he must be a British subject—not necessarily an Englishman, Scotsman, Welshman, or Irishman, but a subject of the Queen. Everyone born within her Majesty's dominions is a British subject; and so is every child legitimately born of a British father in a foreign country.

But besides this citizenship by birth, there is an acquired citizenship by **naturalisation**. Any foreigner who has lived in England for five years or more can apply to the Home Office to be made a British subject. The like privilege is granted to anyone who has been in the service of the Crown for not less than five years and intends to reside in England. The applicant must prove to the satisfaction of the Home Office that he has resided in the country or served the Crown for the proper period. But the Home Secretary is not in any case bound to grant a certificate of naturalisation. He may refuse the application without assigning any reason whatever; and there is absolutely no appeal from his decision. But if the Home Secretary grants his certificate, the applicant must take an oath of allegiance to the Queen; and after this is done, he may exercise all the powers and privileges of a citizen and has the rights of a British subject in everything except one. That one is this: If the naturalised citizen should happen to be in a country of which he was a citizen originally, and the laws of that country do not recognise the right of their born subjects to become members of another nation, the British Government will not assist that person as against the foreign Government. For instance, I believe that the laws of Germany do not allow a German subject to throw off his nationality. Nevertheless, a German may be naturalised in England. But if he has run away from the Fatherland to avoid the conscription, and afterwards goes back there on business or pleasure, he will most probably be laid hold of and punished. And the British Government will not interfere in his favour. Besides this provision for naturalisation of aliens, the Naturalisation Act of 1870 provides for expatriation by enacting that any British subject living in a foreign state and becoming naturalised there shall cease to be a Briton.

The second qualification of a candidate is to be **a male**; and the third is to be **twenty-one years of age**. There have been instances of young men under twenty-one sitting in the House of Commons; for instance, Charles James Fox was elected a member, and actually sat when he was only nineteen. There are certain persons otherwise qualified **who are disqualified** by reason of holding some office or position. Thus, clergymen of the Church of England, Roman Catholic priests, and ministers of the Church of Scotland are excluded. So are judges, and holders of pensions (except military, diplomatic, and Civil Service pensions), Government contractors, and holders of offices created since 1705 cannot sit in the House. Anyone who holds an office of profit under the Crown created before 1705 loses his seat, but may offer himself for re-election. Peers of England and Scotland are absolutely ineligible for any constituency. Irish peers are on a different footing. As I daresay most of you know, all the Irish peers do not sit in the House of Lords; the whole body of the Irish peerage elect twenty-eight of their number to represent them in the Lords. Any of the non-representatives may enter the House of Commons as members for an English or Scottish constituency—Lord Palmerston, for instance. But no Irish peer can ever sit in the House of Commons for an Irish constituency. Thus, when the Marquis of Londonderry succeeded to that title he was member for County



Down; but his seat for that constituency becoming vacant, he entered the House of Commons for an English constituency.

**Other disqualifications** for membership of the House of Commons are:—

(1) **Conviction for treason or felony.**—If a member is convicted he vacates his seat; and the Speaker issues his writ for a new election upon receiving a certificate of the conviction from the Court where the M.P. was tried. And any felon or traitor, who has not served his sentence or received a pardon under the Great Seal, is incapable of being elected. This was decided as late as 1875 in the case of John Mitchel. A convict out on ticket-of-leave has not served his sentence; nor is a ticket-of-leave equivalent to a pardon. It comes to this, that if a man is convicted and sentenced to ten years' penal servitude, although he may be let out on ticket-of-leave at the end of about seven years, he is not eligible for Parliament until the ten years have expired.

(2) **Bankrupts** are subject to a kind of disqualification. If the bankruptcy is not annulled within six months, or if the bankrupt is unable to obtain a certificate that his bankruptcy was caused by pure misfortune and not by misconduct (*see* p. 1031), he forfeits his seat.

(3) If any person is found guilty of **corrupt practices** at a Parliamentary election, he can never sit for the constituency where he practised the corruption; nor can he sit for any constituency for seven years—practically debarring him from at least two Parliaments. Corrupt practices are, briefly, bribery and treating; and the disqualification for election is not the only punishment to which a candidate who has resorted to bribery is liable. He may also be fined not more than £100, and imprisoned for not more than one year (*see* more fully p. 1041).

(4) It is the practice, when any M.P. is found to be **insane**, for the House of Commons to pass a resolution declaring his seat vacant. But I do not know of any authority for saying that a lunatic cannot be elected to the House. I mean that the returning officer for the county or borough cannot refuse to receive a nomination on the ground that the person nominated is *non compos mentis*.

There were formerly other disqualifications for membership. Roman Catholics, Jews, and persons without a certain amount of property have only been admitted in comparatively recent times. And there was once a law disqualifying the sheriff of a county from being elected for his own shire. In the time of Charles I. the Government of the day made a very ingenious use of this disqualification by appointing prominent members of the Opposition who were county members to be sheriffs. After the great lawyer, Coke, was deprived of his judgeship, and became the most dangerous of all the anti-Court party in Parliament, an attempt was made to turn him out by nominating him sheriff of his own shire. Coke tried to get out of the difficulty in a characteristic way. He objected that in point of law he was not compellable to take the sheriff's oath of office, because that oath (which had been imposed by Henry V.) bound the sheriff to put down all Lollards (*i.e.* Protestants); and this, said Coke, was an illegal oath, because the Reformed religion had become the law of the land. In the end the form of

oath was altered, and the famous lawyer, who was also the greatest Parliamentarian of his day, was, to his great chagrin, forced into the unwelcome office, and so deprived, indirectly, of his seat in the Commons. An Act was once passed to exclude all lawyers, and in 1404 the men of the long robe were excluded from Parliament. As, in those days, the lawyers were the only class, except the clergy, who were also disqualified, who possessed any learning, the Parliament of 1404 has gone down to history as "The Unlearned Parliament."

**Mayor, Alderman, and Councillor.**—By the Municipal Corporations Act, 1882, every town and city council is to elect, every year, a mayor, who is to preside over the deliberations of the council. The mayor and aldermen are to be elected by the council—not necessarily out of their own body, though it is usual for councillors to be elected aldermen, and for the mayor to be chosen out of the aldermanic body. Anyone may be elected mayor or alderman who is qualified to be elected a councillor. Or, to put it in another way, although a mayor or an alderman need not be councillor, no one can be mayor or alderman unless he might have been a councillor had his own and his fellow-townsmen's inclination been that way.

**Who may be a Councillor?** becomes the important question. There are three qualifications. The first is, "every person who is at the time of election qualified to elect to the office of councillor." You ought to observe that this does not simply mean that the person in question is on the burgess roll. He must also be qualified to be an elector; and if he ceases to reside in the borough for six months, his office becomes vacant, unless he was at the time of his election, and continues to be, qualified in some other manner.

The other two qualifications are:—(1) That the person is enrolled and entitled to be enrolled as a burgess. It occasionally happens that a person who does not possess the qualification is put on the burgess roll, and, not being objected to at the revision, remains there. Now the fact that his name is on the roll entitles him to vote, but it does not entitle him to be a councillor. If elected to that office his election might be challenged on a petition, on the ground that he ought not to have been enrolled as a burgess. (2) When anybody is entitled to be enrolled as a burgess by reason of occupying as owner or tenant in the borough a building of any value or land of the clear yearly value of £10 and paying rates, but lives beyond the seven miles' limit (*see* p. 1023), he is entitled to be placed in a separate non-resident list if he lives within fifteen miles of the borough. And such a person may be elected a councillor.

There is, however, one great difference between councillors qualified under the last paragraph and those qualified under the paragraph preceding the last. Those qualified under the last paragraph must be persons of some property. In a borough having four or more wards, the candidate must be possessed of landed or other property of £1,000 in value, or else be rated to the poor on the annual value of £30. When the borough is not divided into four or more wards, the property qualification is half the above; namely, £500 worth of property, or poor-rate assessed on £15 a year.



The qualifications of a **county councillor**, county alderman, or chairman of a county council are similar to those of a town councillor, alderman, or mayor. But there are two additional qualifications. A peer owning real property in the country, being entitled to vote for the county council, is also entitled to be a county councillor. And all persons registered as ownership voters for Parliament in the county may elect or be elected.

Having stated the qualifications, now let me show the **disqualifications**. Clergymen and ministers of religion are barred from service on a town or city council, but not on a county council. A local preacher, or a person who, at the request of a congregation, occasionally or temporarily conducts services, is not a minister within the meaning of the Act. He need not be ordained, nor, I think, need he be paid; but he is not accounted a minister unless he has been definitely appointed to minister regularly to the spiritual needs of a congregation.

There seems to be **no objection to peers**, though they cannot vote for Parliamentary candidates.

Officers of her Majesty's regular forces on the active list cannot be either mayor, alderman, or town councillor; but they are not disqualified from service on a county council. An officer in the militia, yeomanry, or volunteers, not being a Regular, is not disqualified at all. Women may elect, but may not be elected.

The most stringent kind of disqualification, and the most painful, is that of the person who holds any **office or place of profit** under the council. And for the same reasons any persons who, directly or indirectly, by himself or his partner, has any **share or interest in any contract** or employment with, by, or on behalf of the council is disqualified. The disqualification by office or interest in contracts, is based on the same principle that forbids a trustee to make bargains with the beneficiaries under the trust, or a guardian to contract with his ward. And if a man has been elected mayor, alderman, or councillor, and afterwards accepts an office of profit or becomes interested in a contract with the corporation, he cannot act as a member of the council while the contract lasts. A very little will suffice to bring a man within the scope of this disqualification. "I think," said Lord Bramwell, "if a shilling's worth of stationery were bought of an alderman, there would be a contract between the corporation and that alderman." The occasion which gave rise to this characteristic dictum was that of an alderman at whose shop the town council used to purchase its candles. The worthy gentleman was condemned to pay penalties. Then there is a more recent case of a chemist who had been appointed chemist to the town council and was afterwards elected a councillor. Money was owing to him at the time by the council, and his assistant subsequently sold to the council four pennyworth of oil. The chemist was held to be disqualified for election. While I am on this subject I may as well say that there is a similar rule in respect of all local bodies. A guardian was penalised for selling provisions to the master of the workhouse. A vestryman was also held to be interested in a contract because he had lent his brother money to carry out a contract with the vestry and had taken an assignment of the contract by way of security.

There are certain **exceptions** to the rule just laid down. If a man has a lease by him to the corporation or the corporation to him, or sells land to or buys it of the corporation, or has an interest in a loan of money to the corporation, or an interest in a newspaper in which the corporation's advertisements appear, or is a shareholder or otherwise interested in a company which has a contract for lighting, supplying with water, or insuring against fire any part of the borough, or in a railway company or any company incorporated by Act of Parliament or Royal Charter or under the Companies' Acts (*see* Book III., Chap. V.), then such a person is not disqualified. So that the poor alderman whose assistant sells half a quire of note-paper to the town council is disqualified for fear of corruption. But the shareholder in the local water company, whose dividends depend on the terms that can be made with the council, can sit and vote.

A **county councillor** is not disqualified by reason of having a share or interest in a contract with the council for supplying stone, gravel, or other material for repairing or making roads or bridges, such material being supplied from land of which he is the owner or occupier. But this is only meant to apply to casual contracts for trifling amounts; wherefore any person who supplies stone, gravel, etc., exceeding £50 in one year is disqualified. It is his share or interest which must be £50. So that if land is in the joint occupation of two people, one a county councillor and the other not, and they make a contract to supply the council with £99 worth of stone to make a bridge, the county councillor is not affected if he and his co-occupier are to share the price equally between them.

**Bankrupts and insolvents** are disqualified from the office of mayor, alderman, or councillor. A man who is adjudged bankrupt, or has made a composition deed with his creditors, immediately ceases to be qualified to hold any of the aforementioned offices. If he pays his creditors in full, and has the bankruptcy annulled, he ceases to be disqualified. And it is to the same effect if the bankrupt obtains a certificate from the Court that his bankruptcy was caused by misfortune without any misconduct on his part. It was held in the case of Lord Colin Campbell that although there was no misconduct on his part, the bankruptcy was not necessarily due to pure misfortune. The noble lord had brought an action for a divorce and had failed. The suit was a long and complicated one, and Lord Colin Campbell had been ordered to pay the whole of the heavy costs and expenses. Being unable to pay, he filed his petition and became bankrupt. Then he applied for a certificate that the bankruptcy had been caused by misfortune without misconduct on his part. But although it was admitted that there was no misconduct—for there is no evil to be said of a man merely because he loses a lawsuit—yet the Court was not satisfied that the bankruptcy was due to misfortune. I take it that a certificate would be granted to a business man who had lost his all through fire; or through the breaking of a bank in which his savings were embarked; or, say, to a jeweller whose stock-in-trade had been abstracted by burglars.

**County councillors and aldermen** must be either (a) persons possessing



the same qualifications as the councillors and aldermen of boroughs and cities; or (b) persons qualified in the county for an ownership vote (*see* p. 1016); or (c) peers owning landed property in the county. But there seems to be no qualification as to means. Moreover, clergymen and ministers of religion are not disqualified.

In Scotland the county councillors must be qualified in the same way as in England; and the borough councillors' qualification is similar to the English. But in Scotland the burgh has no aldermen. It has **bailies** who answer to the English aldermen. But while in England it is possible for a man to be an alderman without having been elected a councillor, in Scotland the law is that the councillors must elect "out of their own number" the bailies of the burgh. And in England the chief magistrate is the mayor, who holds office for one year (but is eligible for re-election), and he also need not be an elected councillor; while in Scotland the chief magistrate and president of the council is the **provost**, who holds office for three years; and is elected by the council out of their own number. He also is eligible for re-election.

The **Mayor** of an English city or borough is a person of great dignity. His official designation is "His Worship." He is by virtue of his office the chief man in the town. He is chief magistrate, and is entitled to preside over the sittings of the city or borough bench of justices; and when he ceases to be mayor he has the right to exercise the office and functions of a magistrate for another year, even though he has not been properly appointed a Justice of the Peace. The mayor is also the returning officer at all Parliamentary elections in the city or borough. The writ by which the election is ordered is sent to him by the Lord Chancellor when Parliament is dissolved—*i.e.* at a general election—and by the Speaker when Parliament is in existence. The mayor must notify that on a certain day, not more than nine days after he receives the writ, he will attend at the Town Hall or other convenient place and receive nominations for the vacant seat or seats; and if more than one candidate be nominated, his worship fixes a day, not more than six days after nomination day, for the polling to take place. After the poll it is the mayor's duty to have the votes counted. He decides in doubtful cases whether a vote has been properly given, for many electors throw away their votes by writing their names on the voting-paper, by crossing out a candidate's name, and by other follies of that kind; and when the votes have been counted, he must declare who has been elected. In boroughs not divided into wards, the mayor is also the returning officer; and in boroughs and cities divided into wards he nominates the alderman of each ward to be the returning officer for that ward at a municipal election.

The **Provost** of a Scottish burgh has functions of a kind similar to his English *confrère*.

**Aldermen and Bailies** differ, as I have said, in this—that an English alderman may be a man who has never been elected popularly, while a bailie must have been elected. The office is also of greater dignity than that of alderman. For a bailie in a burgh royal is a magistrate, exercising judicial

functions in petty cases; while an alderman has no magisterial functions. It is, however, customary for the Lord Chancellor to appoint most of the aldermanic bench Justices of the Peace for the borough. Beyond his functions as a member of the council, an alderman has no others, save the duty of acting as returning officer in his ward at a municipal election. He has also a dignity next to that of mayor and above that of a councillor.

As in the case of Members of Parliament, aspirants to municipal office are disqualified by **corrupt and illegal practices**. And as it is not difficult to be guilty of an "illegal" practice, and as "corrupt" practices are not infrequent, I propose to tell my readers something about the subject. Before 1832 bribery and corruption at elections were carried on to an extent that makes us blush for our ancestors. So open and systematic had become the practice of buying boroughs, that there were regular brokers, who, for a commission, would arrange the price of the seat. This was easy at a time when the electors of a borough were perhaps only half a dozen. In 1768 the mayor and ten aldermen of Oxford offered the seat for sale at a reserve price of £5,670. In 1779 £30,000 was the sum spent in bribing the independent freeholders of the county of Gloucester.

From time to time various Statutes have been passed to prevent corrupt and illegal practices at elections; and the Statutes now in operation are the "Corrupt and Illegal Practices Prevention Act, 1883," the work of Sir Henry James (afterwards Lord James of Hereford), dealing with these practices at Parliamentary elections, and the "Municipal Elections (Corrupt and Illegal Practices) Act, 1884," the object and application of which may be gathered from its name. The two Acts have much in common, the Municipal Act being, in fact, only an adaptation of the Parliamentary Act to municipal and other local elections.

It should first be borne in mind that there are **two distinct classes of offences** aimed at—those which come under the category of corruption, and those which are less grave and are only illegal. It is important to notice the distinction, because not only is the latter class less serious morally, but it is not so grave in its legal consequences.

"**Corrupt practices**," according to the Statute, includes five species of offences—namely, bribery, treating, undue influence, and personation, and aiding, abetting, counselling, and procuring the commission of the offence of personation. All these are crimes punishable as on p. 1040 *et seq.*

**Bribery** is defined in an old Corrupt Practices Act of 1854 with a great deal of minuteness. To give, lend, or agree or promise to give or lend, or to offer or promise or endeavour to procure any money or valuable consideration, to induce any voter to vote or refrain from voting, is bribery. The offer, promise, gift, or loan need not be made to the voter himself; it may be to someone on behalf of the voter or to anyone. The great thing is that the briber intends by his gift, promise, or loan, to obtain a vote for one candidate or to take a vote away from another. And in order to spread the net widely, anyone who corruptly does any of the acts mentioned in this paragraph, even after the election, on account of the voter having voted or



refrained from voting is guilty of bribery. A further kind of bribery consists in giving or procuring, or agreeing to give or procure, or offering or promising any employment, office, or place in order to induce a voter to vote or refrain from voting. It is equally bribery to promise that you will try to procure employment, office, or place to induce a vote or an abstention. And to do any of the above-mentioned things corruptly after the election, as a reward for voting or abstaining, is bribery. Here, also, it is not necessary that the employment or promise thereof should be to the voter himself, for you are equally culpable, no matter who is the person to obtain the benefit if, in fact, you acted in the way described for the purpose of influencing a vote. Again, it may be better worth your while to offer to do something for Jones, who is not a voter himself, if he will use his influence on behalf of your candidate. This also is bribery. And if the corrupt inducement can be traced to you, no matter through what tortuous channels it may have flowed before it reached the ultimate object, you, as well the agents whom you employed, are guilty of bribery.

There is another form of the offence which consists of paying or lending money to be used for the purposes of bribery—not to bribe this or that elector, but for general purposes of corruption. Many people now living in a certain manufacturing town in Lancashire will remember the famous “bottling” case at a hard-fought municipal election in the late 'sixties. The polling day was Monday, and in the course of the day the organisers of one party found that about thirty free and independent electors were missing. Search was made for them, but they seemed to have disappeared from the face of the earth. Inquiry revealed the fact that they had not been home the previous night. At last, late in the day, a man passing down a side street heard a crash of glass, and, looking up, he saw that a pane of glass in the top storey of a disused mill was broken. He jumped at once to the conclusion that the missing voters were in that mill. In less time than it takes to tell it he raised an outcry, and hundreds of men rushed to the spot. The doors of the mill, both inside and out, were locked, but the crowd brought timber from a neighbouring wood-yard, battered in the doors, and released the prisoners just in time to drive them to the polling booth before the poll closed. Curiously enough, their votes turned the scale, for the candidate to whom they gave their suffrages was elected by something like a dozen votes.

The truth of the story, as told by the electioneering agent who planned this bold stroke, was this:—“I knew it was to be touch-and-go in that ward, so I thought that to make sure of it I had better put a few of them out of the way. I went to old Blank, who would always let us have a little money at election times and ask no questions. I met him coming out of service on Sunday night, and he gave me £50. Then I sent one of our lads to the — public-house, where I knew a lot of the other men would be. This lad dosed them well with beer and whisky and we waylaid them, took them to the mill, of which I had borrowed the keys, bound them hand and foot, gagged them and covered them with cotton waste. They were too far gone

to resist." The secret of this manœuvre was so faithfully kept that the authorities were quite unable to trace it; and I had the information only on condition of mentioning no names. But if the benevolent Mr. Blank had been discovered, he would have been prosecuted for bribery because he supplied money to be expended in order to procure the return of a candidate at an election.

By the Representation of the People Act, 1867, any person who directly or indirectly **corruptly pays rates** for a ratepayer in order that the ratepayer may be registered as a voter, thereby to influence his vote at a future election, is guilty of bribery; and any candidate or other person directly or indirectly paying a rate on behalf of a voter to induce that voter to vote or abstain from voting, is also guilty of bribery.

Be careful to notice that it is not necessary, in proving bribery, to prove that any money has actually been paid, or anything actually given to the voter or anyone on his behalf. The offence is fully constituted when an offer is made. Thus, if I tell a man that if he will vote for Mr. Jorful I will give him a sovereign, or send him a turkey at Christmas, I am guilty of bribery, even though he refuses my offer with indignation. Much more, of course, am I guilty if the man accepts my offer; even though in the end he does not vote for Mr. Jorful and I do not send him his promised present.

There are two sides to the question of bribery. For not only is the briber guilty of bribery if he does any of the acts mentioned above, but the voter who is bribed is to be deemed guilty of bribery. It seems a little odd to say that the man to whom a bribe is administered is guilty of bribery. It is as though one should say that a man to whom physic is administered is a physician. This aspect of the misdemeanour of bribery comprises two classes of people, voters and non-voters. A voter is guilty if he before or during an election receives, agrees, or contracts for money, gift, loan, or valuable consideration, office, place or employment for himself or any other person for voting or agreeing to vote, or for refraining or agreeing to refrain from voting. Then you have people who are not necessarily voters—they may or may not be on the list. Every person who receives money or valuable consideration after the election because he has induced a voter to vote or abstain from voting, or because some person has voted or refrained from voting, is guilty of bribery.

I would have you note that it is bribery even if the voter is not to have any personal benefit out of the transaction. Thus, Jones has a vote. The candidate promises Jones that if he will vote for him, employment shall be found for Jones's brother. The candidate is guilty of bribery for having made the offer. If Jones assents to the bargain, he is also guilty. And if, after the election, employment is found for Jones's brother, and the brother accepts the employment knowing why it is given, Jones's brother is also guilty of bribery. It is not necessary that it should be the candidate or anyone authorised by him who administers the bribe. If I have very much at heart the success of a candidate at an election, and of my own



motion 'give or offer bribes in the way of money, loans, presents, or employment in order to induce persons to vote or influence votes on his behalf, I am guilty of bribery.

Bribery is now a comparatively rare offence, on account of the size of constituencies and the introduction of vote by ballot. It was easy enough to bribe a constituency consisting, maybe, of from a dozen to a hundred electors. It is almost impossible to bribe a modern electoral district of from five to twenty thousand voters. And, moreover, in the old days, you could find out whether the man whom you had bought kept the corrupt bargain, for he recorded his vote in the open day and in the public hearing. Now, after being bought, he can sell the man who has purchased him—a course of conduct to be expected from a man base enough to take a bribe.

There is, it is true, an insidious form of corruption practised by men of means, known as "nursing the constituency." The nurse goes to live in the constituency, subscribes liberally to all manner of charities, church and chapel bazaars, clubs and what not. More than one judge has recently made strong remarks on this kind of thing; but there seems to be no way of getting at the men who practise this modern form of "bread and circuses." I think a skilful Parliamentary draftsman might find a way, if he were given a free hand in drawing a Bill.

Unless the methods last described are adopted, the most feasible way of debauching large numbers of voters is by

**Treating**, which is defined by the Corrupt Practices Act, 1883. The word is a popular one; and its statutory meaning is practically the same as the meaning popularly attached to it. It is the corrupt providing of or payment for any meat, drink, entertainment, or provision for the purpose of corruptly influencing a vote or votes. It need not be the voter who is treated. So long as the meat, drink, entertainment, or provision is administered in order to induce a voter to exercise or abstain from exercising his privilege, the offence is complete. Therefore, if I give a penny bun to little Johnny Jones in order to win the heart and vote of his mother, the widow Jones, who is a voter at the municipal election, I am guilty of treating Mrs. Jones. And if at an election time I "stand treat" to the extent of bestowing glasses round on a crowd in a public-house, calling on them to drink success to the right candidate or confusion to the enemy, I am guilty of treating, though it may turn out that not a single man in the crowd is on the electoral list.

As in the case of bribery, not only the treater, but the treated is guilty of treating. I may say, however, that it is not merely the giving of meat, drink, or other creature comforts, nor the mere acceptance of them which constitutes treating. The giving must be intended to be corrupt; otherwise the giver is guiltless. And the acceptance of the gift must be corrupt, else the receiver is not guilty.

**Personation** is an offence of which the standard definition is contained in the Ballot Act, 1872. It is the most serious of all corrupt practices, and

consists in applying for a ballot paper in the name of some other person, whether such person is living or dead, or is a fictitious person. There is a rather curious fact, not known to everybody. You have heard, I daresay, of the American politician's advice to his supporters:—"Vote early and vote often." Anyone who votes early is to be commended, but he who votes more than once at the same election is guilty of an offence against the law. For the Ballot Act distinctly says that when a man has voted once and he applies at the same election for another ballot paper in his own name, he commits the crime of personation. To speak of a man personating himself sounds somewhat Gilbertian, but it is a legal possibility. I have heard of people who, having by mistake been placed on two lists in the same constituency, have voted twice. This may happen when a man owns property in one village and resides in another part of the same electoral area. I never heard of a prosecution for personation in the case of such a mistake, but in my opinion the double voter is guilty of personation. It is no excuse for him to say that he did not know the law, for "ignorance of the law excuseth no man."

I would add that anybody who assists, or advises, or persuades, or procures another to commit personation is himself guilty just as much as if he himself had done the deed. And an attempted personation is also, in law, personation, though the offender is detected and never, in fact, records the vote. The officer in charge of a polling-station has power to give into custody straightway anyone whom he detects in the offence.

**Undue influence** may be said to be the use of or threatening the use of violence or harm in order to induce or compel any voter to vote or refrain from voting. The offence is also committed if the voter is threatened with violence or harm, or has violence or harm inflicted on him, because he has voted or refrained from voting this way or that. The words of the Corrupt Practices Act, 1883, are very wide:—"To make use of or threaten to make use of any force, violence, or restraint," deals with cases of the use of physical power. Then, "to inflict or threaten to inflict any temporal or spiritual injury, damage, harm, or loss," deals with cases in which a workman is threatened with the loss of his employment, a tradesman with the loss of his custom, and also with cases in which ministers of religion so far forget themselves as to threaten members of their flock with their excommunication, or spiritual censure, or harm. Cases under the last head occurred not infrequently in Ireland at the time of the Nationalist disruption. With regard to threatening a tradesman with loss of custom, it appears that if I, at an election, say to a tradesman, "I shall not deal with you because you are a Pink supporter," I am not guilty of anything. But if I say, "I shall not deal with you if you vote for Mr. Jorful," I may be guilty of undue influence.

There is a further kind of undue influence, aimed at the tricks of election agents and over-zealous partisans who practise fraudulent devices upon electors. The first offence is **abduction**, the sort of stratagem described in the case of "bottling" (p. 1034), and consists of spiriting away the elector so that he cannot record his vote. The second is **duress**, the nature



of which I have described in the Chapter on Contracts (p. 273). If, for instance, Tom Jones meets you when you are on your way to the polling booth at a quarter to eight in the evening just before the poll closes, and he terrorises you so that you are afraid to try to pass him, and he keeps you there until it is too late for you to exercise your right, Tom Jones is liable to be found guilty of undue influence. The third heading is any **fraudulent device or contrivance** to impede or prevent the free exercise of the franchise of any elector. There is one common trick which was described by the late Mr. Justice Denman as objectionable and discreditable, but not a contravention of the Act. I refer to the practice of sending out imitation voting papers marked with a particular candidate's name, frequently called the "card trick."

**Illegal practices** are distinct from corrupt practices. They may be defined as the doing of acts for the purpose of promoting the election of a candidate, which are not necessarily corrupt in themselves, but which tend to corruption. The first kind of illegal practice is **excessive expenditure**. The Parliamentary Corrupt Practices Act fixes the maximum of expenditure as follows:—

*In boroughs*—£350 if the number on the register does not exceed 2,000. If it exceeds 2,000, there is allowed £380 and an additional £30 for every complete 1,000 electors above 3,000. So that if there are between 2,000 and 3,000 registered electors, the limit is £380. If between 3,000 and 4,000, £410, and so on. This scale applies to Great Britain only. In Ireland the constituencies are usually smaller, and there is a lower scale applicable to small Irish boroughs. If the electorate does not exceed 500, the maximum amount is £200; from 500 to 1,000, £250; and from 1,000 to 1,500, £275. After that, the higher rate applies. In counties in Great Britain, £650 is the maximum where the electorate does not exceed 2,000. In Ireland only £500 is allowed. Where the constituency is larger, the candidate may expend £710 in Great Britain, and £540 in Ireland; and an additional £60 in Great Britain and £40 in Ireland for every complete 1,000 electors above 2,000.

These expenses do not include the personal expenses of a candidate, nor the sums paid to the returning officer for his charges. These charges are strictly limited by law, and vary slightly according to the size of the constituency. The returning officer (Mayor, Provost, or Sheriff) may demand the deposit of a sum in cash; it is different in boroughs and counties, and varies according to the number of registered electors. The term "personal expenses" means the reasonable travelling expenses of the candidate and the cost of his living at hotels for the purposes of the election.

At a municipal election the maximum expenditure is £25 where the borough or ward contains 500 (or fewer) electors, with 3d. additional for every elector above 500. At district and parish council elections there is no limit.

It is illegal to let, lend, or employ for the purpose of **conveying electors** to or from the poll any public stage or hackney carriage or horse, or any

carriage or animal kept for the purpose of letting out for hire. I need hardly say that there is nothing to prevent an elector hiring a cab at his own expense to drive himself to the poll; but he must not invite a friend to share the vehicle, unless the friend also pays a share of the cab hire. Much more is it illegal to pay the **railway expenses** of a voter who has left the district but is on the register (*see* Southampton case, p. 1043).

No room may be used as a committee-room in a house where intoxicating liquor or refreshment is sold, other than a permanent political club. And there is the same prohibition of the use of the premises of a public elementary school receiving Government grant.

It is also illegal to employ **paid assistants**, except to a very limited extent. The candidate in a borough may have a paid election agent; and in counties a deputy election agent in each polling district. He may also have one clerk and one messenger for every 500 electors. In a county he may have at the central committee-room one clerk and one messenger, and one clerk and one messenger over for every 5,000 or part of 5,000 after the first 5,000 electors. At district committee-rooms the county candidate may employ one clerk and one messenger for every 500 (or part of 500) electors in that polling district.

At municipal elections you may employ two clerks or messengers for your ward or borough, and one additional one for every 1,000 electors (or part of 1,000) after the first 2,000. Thus, three clerks for 2,500, four clerks for 3,000–4,000. In addition, all candidates may have one paid agent at each polling station. At other local elections, for guardians, and district and parish councillors, you are not allowed to pay agents; but otherwise there is no limit to your power of spending money—except, of course, in corrupt or illegal practices.

These paid agents may or may not be on the electoral register. If they are, they must not vote, under pain of being punished for an illegal practice.

No candidate or any other person, for the purpose of the election, may pay or contract to pay an elector for the use of any house, land, building, or other premises for the exhibition of any public announcement. But there is one exception—an obvious and a necessary one. It is perfectly allowable to pay a person who ordinarily carries on the business of an advertising agent for posting and exhibiting bills and advertisements.

**Committee-rooms** are only allowed to be hired in limited numbers. At a municipal election, one committee-room is allowed for the constituency, whether it be a ward or a whole borough, with an additional room for each 2,000 voters after the first 2,000. At a borough (Parliamentary) election there may be one committee-room for every 500 electors; and at a county (Parliamentary) election one committee-room for every polling district; and if any polling district contains over 500 voters, then an additional room for every 500 or fraction of 500 after the first 500.

Not only is the person who actually makes any illegal payment guilty of an illegal practice, but every person who receives such payment is also guilty provided he knows that he is contravening the Act. Knowledge that he is contravening the Act means knowledge as a matter of fact, and not as a



matter of law. I mean that if you are employed by a candidate at a Parliamentary election (for instance) to act as paid agent at a polling booth, knowing that he has already one paid agent at the booth, you are knowingly breaking the law. But if you were not aware when you accepted the employment that another agent had been employed, you are not knowingly contravening the Act. For you are not supposed to know that he had already engaged an agent. That is a matter of fact of which you can plead ignorance. But you are supposed to know that more than one polling agent cannot be employed at the same station. That is a matter of law; and, as we have already had occasion to remark, ignorance of the law excuseth no man.

In the same way, if the candidate has contracted election debts exceeding the maximum amount allowed, his creditors can recover those debts provided they were not aware that the maximum had been exceeded. But if a candidate has hired your shop window for the purpose of exhibiting his bills, you cannot recover the hire unless you are an advertising agent. And it makes no difference whether or not you were aware that the Statute forbids such contracts. You ought to have known, and are guilty yourself of an illegal practice in making the contract.

In order to put a stop to the kind of practices so picturesquely described by Dickens in his account of the Eatanswill election, namely, of **hiring bands** and banners and paid processionists, and **distributing "colours" and cockades**, the Corrupt Practices Act prohibits a candidate or any other person from paying for bands of music, torches, flags, banners, cockades, ribbons, or other marks of distinction under pain of being convicted of illegal practices. At the Walsall election some years ago a large number of hat-cards were purchased and distributed in the town. These cards were printed in the party colours, and bore such devices as "Play up," "Go in and win," and other encouraging mottoes, and were intended to be used and were used by sticking them in the hat-bands of those who were foolish enough to wear them. I daresay readers who live in the North and Midlands of England are familiar with the hat-cards worn by followers of favourite football clubs. The Walsall political hat-cards were like them. Whether they had any effect on the electors I know not; but I know that two judges held them to be "marks of distinction," and so illegal within the meaning of the Act. And the candidate lost his seat mainly because of them.

**Punishment of corrupt and illegal practices.**—The consequences differ somewhat according as the practice is committed by a candidate or his agent, or by a person not a candidate.

A person, whether a candidate or not, who commits any **corrupt practice** other than personation or aiding and abetting personation is guilty of a misdemeanour ("offence" in Scotland), and is **liable to be prosecuted** and fined any sum up to £200, or imprisoned for not more than a year with or without hard labour. Personation is a much more serious offence. It is felony; and the personator, or anyone who aids or abets him, is liable to be imprisoned for a term not exceeding two years with hard labour.

There is no option of a fine here as there is in other cases of corrupt practices. I suppose the difference is made because personation is necessarily a deliberate offence, while it is possible to commit bribery or to use force in a moment of excitement.

In addition to these punishments, a person so convicted is incapable for the next seven years of being registered as an elector or voting at any election whatever in the United Kingdom, whether that election be Parliamentary, municipal, or for any local public body whatever. Neither can he hold any public office, whether of a representative or a judicial character, during those seven years. Should he actually hold an office of the kind at the time of his conviction, that office is vacated. The expression "public office" means any public office or appointment under the Crown, and any office under the charter of a city or borough. It also includes the offices of mayor, alderman, provost, bailie, councillor, guardian, member of a school board or any other local board, commission, or authority; and all offices under a council, board, or other authority—I mean, for instance, that of a town clerk, clerk to the school board, and the like. There is also a special provision which includes the office of Justice of the Peace among the judicial offices vacated by conviction.

If a **candidate is guilty by his agents** of a corrupt practice, a petition may be presented against his election. Such a petition is tried by two judges of the High Court (or Court of Session) in a Parliamentary case; and by a commissioner specially appointed in a municipal or other case. If the report is against the candidate [Parliamentary], his election is void; and he is disqualified from being elected to or sitting in the House of Commons for the county or borough where the offence was committed for seven years after the date of the report. This is in addition to the punishments, specified in the two preceding paragraphs, which will be visited on the agent.

If the **candidate is personally guilty**, a petition may also be presented, and the candidate will lose his seat. If the offence is that of treating or undue influence, the candidate is disqualified for seven years; and if of personation or bribery, the candidate is incapacitated for ever from sitting as M.P. for the borough or county in question, and for seven years for any other constituency. To make the candidate personally guilty it is not necessary to prove that he himself administered the bribe, or "stood treat," or personated a voter. It is enough that the corruption was practised "by or with the knowledge and consent" of the candidate. This, again, is in addition to the fine and imprisonment previously mentioned.

In **Municipal and other non-Parliamentary elections**, when the commissioner who tries an election petition finds that any corrupt practice other than treating and undue influence has been proved to have been committed by the candidate or with his knowledge or consent, or that the candidate has been personally guilty of treating, that candidate is for ever disqualified from holding a corporate office in the borough or district in question; and his election is void. The penalties of fine and imprisonment



apply to the candidate equally with other persons. If the election Court reports that the candidate is guilty, not personally but by his agents, of any corrupt practice, the candidate is disqualified from holding any public offices in the borough, county, district, etc., for a period of three years from the date of the report.

The **punishment of illegal practices** is lighter than for corrupt practices. The accused person can be summoned before the magistrates or stipendiary magistrate and fined on conviction a sum not exceeding £100. This is whether the guilty party is the candidate or not. But illegal practices by a candidate or his agent do not disqualify the candidate from being elected by any other constituency.

**At a Parliamentary election**, if a petition is presented against the return of a candidate, and the election Court reports that such candidate has suffered illegal acts to be practised on his behalf—*i.e.* that illegal acts have been committed by the candidate or with his knowledge or consent—that candidate loses his seat, and is disqualified for seven years from sitting in the House for the county or borough in question. If the illegal practices were done by the candidate's agents, without that gentleman's personal knowledge or connivance, the disqualification only lasts for the duration of the Parliament in respect of which the election was held—at the outside, a period of six-and-a-half years, and possibly only a few months.

**At a non-Parliamentary election**, when an election Court reports to the High Court that a candidate has been guilty by himself or his agents of an illegal practice, the candidate reported loses his seat. Moreover, the candidate may not hold any office in the borough or other corporate area for the period during which he was elected to serve, or might have served.

There are, moreover, **excuses allowed by the law for illegal practices** in certain cases. The first is, that the illegal act was not that of the candidate but of his agents; and that his agents acted illegally contrary to orders, and without the sanction or connivance of the candidate. But the candidate who tries to be excused must prove not this only. He must also satisfy the Court that he and his election agent took all reasonable means to prevent corrupt and illegal practices. Then he must proceed to show that the acts were of a trivial, unimportant and limited character; and also that in all other than these one or two trivial matters the election was free from corrupt and illegal practices by himself or any of his agents. Upon this the Court may report that these facts have been proved to their satisfaction, and hold the candidate excused from the incapacities arising under the Acts: that is, the candidate does not lose his seat; nor is he debarred from being elected at any future election. If in addition the candidate can convince the election judges that the illegal act was done quite inadvertently, and without bad faith—innocently, in fact—the Court may even remit the penalties as well. But before applying in such a manner, the candidate must give notice in the constituency by public advertisement.

Now it does frequently happen that a candidate commits an act forbidden

by the Statutes as an illegal practice by pure inadvertence, or by an accidental miscalculation. To show you what I mean:—It is an illegal practice to hold a committee or other election meeting in premises (other than a permanent political club) which are licensed for the sale of liquor, or in which liquor is sold. And it is quite sufficient to bring you within the clutches of the law if you hold a meeting in a room which has some interior connection with such a club or licensed premises. Not seldom halls such as Freemasons' halls, and other places of a like character convenient for the holding of meetings, are part of premises where liquor and refreshments are sold or supplied; and the candidate's agent hires the hall without being aware of the fact that it is connected with such premises. Or, again, the candidate runs up bills for (say) posters, which, together with his other necessary expenses, bring his total expenses above the legal maximum. Perhaps his agent has miscalculated.

In cases of this character let me advise you, if you are a candidate, to **take the bull by the horns**. Do not give your friends the enemy time to present a petition; but apply at once to the Court, give evidence of the mistake, and of how it occurred; tell the judges on your oath that the error was one purely of inadvertence or miscalculation; and ask them to relieve you from the consequences of the act. They will do this if they are convinced of your *bona fides*, and that no actual harm has occurred. Before you apply, you must publicly advertise in the constituency that you intend to make the application, so as to give anyone the chance to appear and oppose the granting of the relief. Remember that unless you take this course, even if no petition is presented against your return, you are liable to be summoned and fined, as before described. And remember also that the judges have no power to excuse you from the consequences of a corrupt practice—only from the consequences of illegal practices. Further, you should also recollect that you cannot be relieved if you have mistaken the law; for instance, if you have held a meeting in a hall connected with a club where liquor is supplied, not knowing that the law forbids you to engage such a hall.

I do not, however, advise any agent or member of an election committee to resort to any illegal practice in the hope that the Court will overlook the matter as trivial and unimportant. For instance, at the Southampton election in 1895, a petition was presented against the return of a candidate on the ground of general treating in the borough, and corrupt and illegal practices. The Court found that the charge of treating and corrupt practices had not been traced to the candidate—the Scottish verdict of “Not proven,” in fact. All the charges were successfully met by the candidate until he came to the last, which was this:—On the day of the election a Mr. B——, who was a member of the candidate's executive committee, sent a telegram to a voter who lived at Winchester: “Come and vote. Fare all right”; and when the man came, Mr. B—— paid him the sum of 2s. to cover his fare. This 2s. cost the candidate his seat. It would not have done so, perhaps, had the election been faultless in all other respects; but the candidate could not satisfy the Court that he and his election agent “took all reasonable means



for preventing" corrupt and illegal practices. It was proved that there was a great deal of promiscuous drinking in Southampton on polling day amongst the supporters of the candidate; and the judges, though they did not hold him responsible for it, could not honestly say that he did his best to stop it. Mr. B—— also was refused relief from the consequences of his illegal practice.

It is always a very important matter to know **when the election commences**, for from that date all expenses incurred by the candidate or his agents must be put down in the amount returned and vouched for after the election is over. And it is an illegal practice, which will never be excused unless it occurred by pure accident, to omit to include all expenditure in the return. The most instructive case was the Lichfield case, in 1895. It will be remembered that the 1895 election came upon the country with startling suddenness; but there was one candidate fully armed and ready for the fray, and that was Mr. F——, who was putting up for Lichfield. For about a year before, this gentleman had been "nursing" the constituency. First of all he subsidised a local paper to write about him; then he spoke at a few meetings, all with intent to test the feeling of his party in Lichfield. At last, on the 14th of March, 1895, at a public meeting, Mr. F—— was introduced as the Liberal candidate, and a resolution was passed pledging the electors to support him. The dissolution of Parliament was not expected until the spring of 1896; but the Government of the day were defeated on the 21st of June, resigned office on the 24th, and on the 8th of July, 1895, Parliament was dissolved. Mr. F—— said, "The election must be said to have begun from the dissolution; or at the earliest, from the 21st of June; because then we had some idea that a contest was to be." But the Court held otherwise. An election, for the purposes of the Corrupt Practices Acts, begins when it is first known that the candidate has decided to offer himself at the next ensuing election, whenever that may be. So that Mr. F—— was declared guilty (through his agent) of not making a proper and correct return of his election expenses, because he had only included sums spent since July, instead of putting down all that he had spent since March. In the Haggerston case it was held that one candidature began in 1892.

It should be observed that expenses incurred by **political associations** may or may not be the expenses of the candidate; and the candidate may not be responsible for their acts. If a candidate subscribe money to one of these associations while that association is promoting a cause only—*e.g.* the Liberal cause, the Conservative cause, and so on—then the candidate need not include this sum in the return of election expenses. But if, as generally happens in the end, the association begins to promote the candidate's candidature, any subscription by him is part of his expenses, and he is responsible for the doings of the association if he identifies himself with it. Thus the candidate for Hexham, in 1892, subscribed £326 to the funds of (I think) the Primrose League. Of this, £35 was spent on a picnic. It was held that this picnic, being intended to promote the candidature of the said candidate, was treating. And as the candidate had allowed the association to ally itself with his

candidature, it became his agent. Wherefore he was found guilty of treating by his agent, and he lost his seat.

But **associations not political**—for instance, associations like the United Kingdom Alliance and the Licensed Victuallers' Association, social and trade societies—take quite a different position. They have an independent interest in the contest. They say, "Whoever will oppose such-and-such a measure, or support such-and-such a measure, shall receive our support." And accordingly they issue addresses and display posters, and generally exert themselves and spend money; but as they are entirely uncontrolled by any candidate, and only support a particular man in a particular constituency because he agrees to forward the objects of their association, the candidate is not responsible for what they do. There is, however, some limitation to the activity of these bodies. For if they set to work to bribe, treat, and generally corrupt and debauch the electorate, a petition may be successfully presented against the returned candidate on the ground that the whole election is void for general corruption in the constituency.

But a society like the Licensed Victuallers' Association has for its main object the promotion of its own interests—the interests of the trade, as it is called; and so does not become the agent of the candidate whom it supports.

Again, a candidate is not responsible for the acts of any number of gentlemen or ladies, who choose to form themselves into a committee or other organisation to promote his return, if he does not recognise them, that is, if they are not in any way an official committee. The members of such an unofficial committee are personally responsible if they resort to corrupt or illegal practices; but in the Windsor case the election Court felt that it would be unfair to hold a candidate responsible for the acts of members of an irresponsible committee (600 members there were), whom he had no means of controlling.

For the offices of **parish and district councillors and guardians** sex is no disqualification. And for the office of parish councillor it appears that a married woman is eligible. The Local Government Act (England) gives two alternative qualifications for the office of councillor in a rural parish. The candidate must either be a parochial elector (that is, on either the Parliamentary or county council list of voters of the parish, or a woman who would be a county council voter if she were not married); or else he (or she) must have resided in the parish, or within three miles thereof, on or before the 25th of March.

You must observe the word "resided"—a word not of the same significance as "occupied." To make a man a resident on premises, he must habitually sleep there. But absence for a time, with liberty of returning when it is convenient to do so, is no break in the residence. For example, if you and your wife have your main house in Birmingham, but are in the habit of running down every week-end to Leamington, you do not break your residence at Birmingham. On the other hand, if one has a house in the parish, the said house being furnished but hardly ever used by the owner, he cannot be said to reside there, though he has a servant and caretakers on the premises and could come back if he liked. *In Scotland*



there is no qualification by residence, but the parish council must be elected from amongst the parish electors.

The **chairman** of a parish council is to be elected at the first meeting of the new council, and he holds office for the year unless he becomes disqualified or resigns. Anyone who has the qualification to be a parish councillor may be appointed chairman of a parish council, even though he has not been elected a councillor by the parish meeting. This is, as you observe, like the law with reference to the mayor of a borough, who need not be a councillor but must be qualified to be one. The chairman, whether a councillor or not, has two votes—a vote when the question is put, and a second or casting vote if there is a tie. The chairman may also summon a parish meeting at any time, and he presides thereat unless it is the annual meeting to elect a new council and he is a candidate for the council. The annual parish meeting is to be held between March 1 and April 1, both inclusive. In Scotland, following the Scottish municipal practice, the chairman of the council must be selected from amongst the councillors themselves, and he is *ex officio* a Justice of the Peace for the county.

To be a **district councillor** one must be either a parochial elector of some parish in the district (*see* p. 1024), or have resided in the district during the whole twelve months preceding the election. Election, for this purpose, begins with nomination. The *chairman* of a district council may be either a councillor or someone qualified to be elected to the position, just as in the case of a parish council chairman. Whoever is appointed becomes *ex officio* a Justice of the Peace for the county, unless such chairman is a woman, or a person otherwise disabled by some personal disqualification. These personal disqualifications are few. A sheriff cannot be a J.P. for the shire during his year of office. Nor can a solicitor sit on the bench in a county (except a city or borough, which happens also to be a county—*e.g.* Hull) where he carries on business. Every J.P. must, before he can exercise the functions of his office, take two oaths—one that he will “be faithful and bear true allegiance” to the sovereign; and the other that he will “do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill-will.” In Scotland the chairman of a district committee is also *ex officio* a J.P.

Now, although a person may be registered as a parish elector, or may have resided in the parish or district for twelve months, he may be **not qualified to hold office**, whether as a parish or district councillor. You may take it that (1) bankrupts are disqualified for five years, and so also are (2) those who within the last five years have made a composition with creditors. Then (3) persons convicted of a crime and sent to prison with hard labour without the option of a fine are disqualified for five years unless the Queen grants a pardon. (4) Any paid officer or servant of the council and (5) a contractor with the council (*see* p. 1030), unless his contract is one of those excepted, as on pp. 1030, 1031. And, again, (6) if one has been convicted of corrupt or illegal practices at an election, he is disqualified from holding the post of parish or district councillor, or any office in or under such a council.

**School Boards.**—Curiously enough, the Elementary Education Acts do not mention any disqualification for membership of a School Board; but there are disqualifications, nevertheless. For the Statute of 1870 has at the end of it certain rules providing that for certain causes a member shall vacate his seat. Anyone who becomes bankrupt or makes a composition or arrangement with his creditors; or who is punished for a crime by imprisonment without the option of a fine; or accepts an office or place of profit under the Board; or enters into a contract except for advertisements in his newspaper or for the sale of land or loan of money to a Board—vacates his seat. So also does a member who absents himself for six successive months from the Board meetings except from temporary illness or other cause to be approved by the Board.

At common law *aliens* are disqualified, and *minors* by an Order of the Privy Council. The Bankruptcy Acts render *bankrupts* ineligible for election, unless they obtain the certificate mentioned on page 1031. If a man was made bankrupt before 1883 and has not yet received his discharge, the disqualification does not apply to him; for the Act of 1883 creating the disqualification is not retrospective. Then the disqualifications mentioned on pages 1041–2 of persons convicted of *corrupt and illegal practices* at elections apply so as to render them incapable of sitting on a School Board. Conviction for *treason or felony* also disqualifies (*see* p. 1028).

It is difficult to say whether **women** are qualified to serve on School Boards or not. I know they have been frequently elected and allowed to sit without objection; but in the opinion of many competent authorities it is very doubtful whether they have any right. True, women may vote at School Board elections; but it does not follow that they may serve on the Board. In a recent case relating to the London County Council, Lady Sandhurst had been chosen by the electors of the Brixton division to represent them. Her opponent, Mr. Beresford-Hope, petitioned against her return on the ground that no woman can hold a public office unless the Statute creating that office specially allows women to be elected. The County Council Act, like the Elementary Education Acts, says nothing about it, one way or the other. Women are expressly allowed to vote in both cases. The Court of Appeal, consisting of six members (Lord Coleridge, Lord Esher, and Lords Justices Cotton, Lindley, Fry and Lopes) unanimously decided that Lady Sandhurst could not be elected, and that all votes given for her were thrown away. Lord Esher declared it as his opinion that except by express provision of an Act of Parliament or in some exceptional case by custom or hereditary right, no woman can be elected to a public office. I should not like to give a positive opinion on the matter; but I certainly think that this decision would be held to apply to School Boards. It may be, as the well-known song says, “a great big shame,” but Parliament could put the matter beyond doubt by a short Act of one clause.

The **chairman** of the School Board must be one who has been elected a member; except in London, where an outsider may be chosen on the same lines that a mayor or alderman of a county council may be



selected. If the chairman should be a non-elected gentleman, he becomes a member *ex officio*; that is, if he resigns the chairmanship he also resigns his membership of the Board.

Unlike a town councillor, a member of a School Board may resign his office without subjecting himself to a penalty. All that he has to do is to give to the Board one month's notice in writing of his intention to retire. It is probable, but not certain, that before the month is up he may withdraw his resignation, but he cannot do so afterwards.

The **nomination of candidates** for the office of *town councillor* must be delivered to the mayor (or provost) at the town clerk's office at least seven days before the day of election, the 1st of November. It must be in writing, signed by two burgesses who are on the list in the ward where the election is to take place, and by eight other burgesses as assenting to the nomination. It is the best plan to send in several separate nomination papers; because, if you only send in one, and one of your ten burgesses happens to be not a Burgess, the nomination paper is void. You must state the full name, abode and description of your candidate on the nomination paper, which you can obtain from the town clerk. That official is bound also, if you ask him to do so, to fill up a nomination form for you. As soon as a candidate is nominated, the town clerk sends him notice of the fact; and on the day after the last day for receiving nominations, the mayor is bound to attend at the town hall between two and four o'clock in the afternoon to receive objections to the validity of any nomination paper. Objections must be in writing, and his worship must deliver his decision in writing. These proceedings are not public. The only persons allowed to attend them are the candidates nominated and one representative each, appointed by the candidate in writing. I was asked at a recent election what ought to be done when the candidate is abroad; for then it is clear that he can neither attend himself nor appoint a representative in due form. The answer is that if the gentleman is out of the United Kingdom, his proposer and seconder may appoint in writing a representative to act.

The mayor has the right to ask anybody whom he pleases to be present to assist him; and he invariably is accompanied by the town clerk as legal adviser. If an objection is made and disallowed by the mayor, the nomination stands without appeal; but if his worship allows the objection, the person objected to has the right to present an election petition. Let me say that even if the mayor disallows an objection, and the candidate whose nomination has been objected to is elected, this does not prevent an election petition from being lodged against the successful candidate on the ground that he was not qualified. (For disqualifications *see* p. 1030). The mayor's decision is only final to this extent—that no one can object afterwards on the ground that the nomination was irregular in form.

**District and parish councillors** can be nominated with somewhat less of formality. In both cases the nomination must be in writing, stating the surname and other name or names of the candidate, his abode and description, and whether he is qualified by residence or as a parochial elector (*see*

p. 1045). Note particularly that the nomination paper shall be signed by two parochial electors of the parish (or other area; *e.g.* a ward of a parish), “**and**,” the rule says, “**no more.**” This rule appears to me to be so strict that if a candidate’s paper should be signed by (say) three electors, it would not be valid. Nomination papers can be procured from the returning officer at a district council election, and from the returning officer or the overseers at a parish council election. The clerk to the Guardians of the Poor Law Union is returning officer at parish and rural district council elections; and the clerk to the sanitary authority at urban district council elections. In urban and rural district council elections the nominations are to be sent to the returning officer; and in parish council elections must be handed in to the chairman at the annual parish meeting held on the 25th of March. The returning officer in the one case and the chairman in the other decides on the validity of nomination papers in the same way as the mayor of a town at a town council election.

**Compulsory acceptance of local offices.**—Any qualified person elected to the office of town councillor, alderman, mayor, guardian, district or parish councillor, or any other of the corporate local offices, is bound to accept that office. No man is bound to fight an election; but if he is elected, with or without contest, he must take the post offered to him by his fellow-citizens. He can only escape by paying a fine, which is fixed for the mayor at £100, and other officers at £50 or such smaller sum as the council or board may determine by bye-law. If there is no bye-law, then the sum is £50 for mayor and £25 for the others.

With regard to municipal corporations, there is also a similar fine imposed on any person who, once having been elected to office, sends in his **resignation**, which must be in writing, signed by him. But this does not apply to the chairman of a parish meeting or council, or to parish councillors, who may resign by giving written notices to the meeting, or council, or chairman. Guardians are allowed to resign on tendering their resignation to the Local Government Board, if the Local Government Board thinks the cause of resignation to be reasonable; and rural district councillors are on the same footing.

All these local offices are accepted by the candidate signing a declaration of his acceptance. A town councillor must do this before he acts in the office, in the presence of two members of the council or the town clerk. District and parish councillors must sign the declaration at the first meeting held after they are elected; or the council may postpone the time by a special resolution to that effect.

I should like to say a word or two about **withdrawal of nominations**. It occasionally happens—indeed, a case came under my notice at a municipal election in 1897—that a man is nominated for an office to which he does not aspire. There is nothing, you observe, to prevent your neighbours Jones and Smith and eight others, all of them being burgesses, from nominating you for the office of town councillor. When the town clerk sends you intelligence of this you are appalled. You have no taste for public life. You are a quiet, peaceable man, and shrink from the notior of having



your name in the papers, from attending meetings and listening to the "blether" of Alderman Bleeter, a worthy man, but prosy. You detest drains, you abhor street improvements, you are willing to submit the important question of whether the High Street shall be paved with wood or granite to the arbitrament of tossing up a sixpence. In fact, you are not at all a public-spirited citizen, and your natural indolence makes you shirk all extra work.

What are you to do? Well, the day after the last day for receiving nominations, before two o'clock, you may deliver to the town clerk a written withdrawal of your candidature. If there are more candidates nominated than there are vacancies to be filled, your resignation takes effect—not otherwise. That is, if your retiring self and the equally retiring Brownjon and the aggressive Robinson are nominated for the Middle Ward, where there is only one vacancy, Brownjon and yourself can retire, leaving Robinson in possession of the field. But if there are two vacancies, you cannot both withdraw. The mayor can only accept withdrawals of candidates validly nominated, so as not to reduce their number below the number of vacancies. And in order that the mayor may not be put to the disagreeable task of choosing between you, it is mercifully provided that the withdrawal which reaches the town clerk's office first is entitled to priority. So that, you see, you can practically be forced into the council against your will; for once elected, as I have told you, you must either accept within five days or pay for your want of public spirit.

A nominee for a parish council may withdraw his name either in writing, or verbally at the parish meeting at any time before the chairman declares him to be duly elected. If there is to be a contest and a poll is demanded, a written withdrawal by the candidate may be lodged with the returning officer at his office at least six clear days before the day fixed for the poll.

I am not very clear how far district councillors have the right to withdraw their candidature. Section 48 of the Local Government Act says that section 56 of the Municipal Corporations Act shall apply as far as can be to district council elections. And it is section 56 and the application thereof that I have set out in the previous part of this page. On the other hand, the Local Government orders provide for the withdrawal of the candidature. My own opinion is that nominees for this office may withdraw by giving written notice within two days after the last day for receiving nominations. This means really that if you are nominated and wish to withdraw you will have to send your withdrawal the same day that you receive notice of your nomination, or the day after at the latest.

There are certain persons who are exempt from serving in local offices, even though they may be elected. These are persons disabled by lunacy or imbecility of mind, or by deafness, blindness, or other permanent bodily infirmity. Age, again, is a good excuse, for no one above sixty-five years of age can be compelled to accept office. Neither can one who within the five preceding years has either served the office or paid the fine for non-acceptance. Registered medical practitioners and dentists are also excused. I suppose the Legislature considered it better to dispense with the services of dentists in public offices than to run the risk of citizens with aching teeth being kept waiting.

## CHAPTER III.

### THE CITIZEN AND HIS TAXES.

Some old taxes—Modern taxes—The land tax—Advice to those about to build—Redemption of land tax—Income and property tax—Schedule A, or property tax—Is a tax on the landlord—But collected from the tenant—Except in certain cases—Houses let in different flats or suites of rooms—Small dwelling-houses—If tenant pays he deducts from next rent—Tax on annual value—How annual value is ascertained—Is higher than rateable value—Except in London—Scotland—Ireland—Business concerns arising out of land—Quarries, mines, railways—On what basis assessed—Ironworks and gasworks—Difference between Schedule A and Schedule D assessment—Deductions and allowances—Charitable and public property—What is a "charity"?—Almost any good public object—Interest on mortgages and bonds taxable—Tax should be deducted—Schedule B—Tax on occupation of land—Not buildings—Affects farmers chiefly—One-third of rent is taken as profit of farmer—Unless he proves contrary—Not nurserymen and market gardeners—Schedule C—Interest on Government securities—Schedule D—Profits of trades, professions and vocations—Residents and non-residents—What is residence for the purpose of income tax?—What is the residence of a limited company?—Foreign possessions—What is a vocation?—Receivers of stolen goods—Minister of religion—Charitable contributions to poor ministers—How to estimate income—Gross receipts *minus* current expenses—Loss of capital not allowed to be deducted—Only expenses necessary to earn profits to be deducted—All profits taxable, no matter how applied—Rent of business premises to be deducted—What if premises both business and residential?—What if trader owns his business premises?—Income from foreign possessions—Profits of uncertain annual value—Cattle-dealers and dairymen—"The *et cetera* clause"—Schedule E—Public officers' salaries and Government pensions—Annual assessment—Master may deduct—Expenses of post allowed—What are they?—Exemption of small incomes—abatement on moderate incomes—Life assurance and annuity premiums—Joint income of husband and wife—How to claim exemption and abatement—Be in time—Appeal to Commissioners—The Special Commissioners—How to act if you have no account books—Appeal to the Courts—Repayment of duty overpaid—Inhabited house duty—The different rates.

The history of taxation in Britain would form a vastly interesting subject for the student of politics. In early times the ordinary revenues of the Crown were not derived from taxation. The sovereign was a great landlord, and, like every other landlord, he derived his revenue from his rents. In Saxon times this was almost the only source of the king's revenue; though in addition there were the fines levied on evil-doers. When William the Norman introduced the feudal system into England, the theory became rooted that the king was the over-lord of the land. The great barons held large tracts of country from him, and in return were bound to render him military service at their own expense, and to grant him the three "aids," which took the form of a money payment to make his eldest son a knight (*faire fils chevalier*), to provide a dowry or tocher for his eldest daughter



(*pour fille marier*), and to ransom the person of the king, should he be made captive by his enemies. In addition, if the heir to a barony was a minor, the king took all the rents and profits of his estates until he came of age; and whenever a baron died, his heir had to pay a "relief" to the Crown, generally amounting to a whole year's rents of the estate. This was succession duty with a vengeance. Should the heir be a lady under marriageable age, she became a royal ward, and the king sold her as a bride—for, to be plain, it amounted to this—to the highest bidder of suitable rank. Then various towns, cities, and boroughs made presents to his majesty as the price of the royal favour and protection. These were the ordinary revenues of the Crown.

In time of war or public danger, the great Council, afterwards Parliament, were wont to grant permission to levy an extraordinary "aid" on the landed classes, and grants of "fifteenths" and "tenths" of all the movable or personal property in the kingdom. But regular taxation there was none until the Commonwealth, when the great Lord Protector borrowed from the Dutch the idea of Excise, or a duty levied on all beer and spirits manufactured in the country. Excise has been continued to the present day.

The Continental wars of William III. rendered regular taxation necessary, especially as the feudal system, with its "aids" and "incidents," had been abolished at the Restoration of Charles II. A poll (head) tax, varying from £10 to £40 per head per year, was imposed in 1692, 1694, and 1698—a most unpopular duty. Charles II. had imposed a hearth tax of 2s. on every hearth. William III.'s first Parliament abolished this, and substituted the odious window tax, which was not repealed until 1851, when the Inhabited House Duty was substituted for it.

**Land tax** was also imposed by William III. as a temporary tax, and was made perpetual by George III.'s Ministers at 4s. in the £. At the same time, landowners were allowed to redeem their land from the tax by paying a composition. In course of time, the incidence of the land tax became exceedingly unfair, because the tax was assessed in parishes; that is, an amount was fixed as the quota of each parish. And as some parishes became less thickly populated, and agricultural land became less profitable, while, on the other hand, the population and wealth of town parishes increased, you had the tax in some places as high as 4s. in the £, and in others as low as a few pence. You will gather the inequality of the tax when I tell you that the rich county of Lancashire only paid £20,989 14s. 6½d., while poor Essex had to find £85,563 9s. 5d., or more than four times as much as Lancashire. Durham only paid £10,597 14s. 5½d.; Suffolk, £68,211 os. 0½d. Consequently, in 1896, the maximum land tax was fixed at 1s. in the £—a manifest relief to Essex, Suffolk, and other agricultural counties. But where the tax was not more than 1s. in the £ it was left untouched.

I may say that you are always allowed to redeem the land tax by paying thirty years' purchase to the Government, either in a lump sum, or by four equal yearly payments of £5 or over, or by instalments extending over four years, but not more than sixteen, each instalment to be not less than £60

a year. Again, interest at 3 per cent. is payable on unpaid instalments. I should advise any reader who owns land, especially in or near a town, and who wishes to build on it, to redeem the land tax before building. The reason is plain when you know it. The amount of land tax charged on land depends on its annual value. Now if you have an acre of land, unbuilt upon, the annual value of it may be about £10. But if you cut it up into building lots, and build houses on it, the value increases enormously. For instance, say you build a row of ten houses, which let at £15 a year each, clear. The annual value of your land is £150. And suppose the land tax in your parish is at 6d. in the £, you paid for the unbuilt-on land 5s. a year. For the built-on land you pay £3 15s. a year. When your land tax was 5s. a year, you could free the land by paying thirty times 5s. = £7 10s. But when the land tax is £3 15s. a year, you will have to pay thirty times that sum = £112 10s., or else go on paying the tax. My advice to you, therefore, is—when you buy land intending to build yourself a house, always ask whether the land tax has been redeemed or not. If not, redeem it before you build. Write to the "Registrar of Land Tax, Inland Revenue, Somerset House, W.C."

#### \* INCOME AND PROPERTY TAX.

Perhaps there is no subject which "comes home to men's business and bosoms," at all events to the business and bosoms of men of the middle class, more than the subject of income tax. Many people, I believe, object to the tax altogether, and denounce it as inquisitorial. Long ago, the ordinary revenue of the country was produced, as I have said, by the feudal "incidents," and it was only in times of pressing danger or actual warfare that the lieges had to put their hands in their pockets to pay a tax to supply the king's needs.

The **first income tax** was imposed in the period of the Commonwealth, when the Parliament, instead of "subsidies" assessed on capital, imposed a tax based on income. Unlike the modern income tax, however, this was not charged upon income arising from businesses, trades, professions, and callings, nor, indeed, upon actual income at all; but was levied on the basis of a supposititious income. Everybody who had capitalised wealth, in the form of landed estate, offices, or rents, and in the form of "goods, chattels, stock, merchandise, or any other real or personal estate," had to pay so much in the pound (varying from time to time) on the rent or yearly value of his real estate, offices, or rents, and so much in the pound on his assumed income arising from his money, goods, stock, chattels, and other personal estate. This assumed income was £5 per cent. per annum. Thus, if a merchant was found to have £100 worth of merchandise, his income from that was assumed to be £5 a year. The tax on the land and houses was to be paid first by the tenant to Government, and then deducted by the tenant from his rent. William III.'s Parliament imposed a similar tax to meet the expenses of that monarch's Continental wars; but, in fact, this burden was never levied on anything except landed property and income from offices, on account of



the local assessors of taxes failing or omitting to do their duty. In course of time it came to be called the Land Tax, and rose from 1s. in the £ to 4s. at the time of the American War of Independence. Mr. Pitt also imposed an income tax in 1799; and the Act of that year may be said to have created the tax as we now know it. At that time it was regarded as a war tax, and was, in consequence, taken off after the Peace of Amiens. When hostilities with the Great Napoleon again broke out, the Chancellor of the Exchequer reintroduced it, with improvements and variations on Mr. Pitt's scheme. Again the incidence of the tax was altered in 1806, and the Revenue Act of 1806 may be regarded as the model of the Act of 1842, under which the system is now worked.

Not that the levying of income tax has gone on ever since 1806. The nation persisted in regarding the direct taxation of income as an expedient only to be resorted to in time of warlike emergency. And after the battle of Waterloo such was the clamour raised for the repeal of the income tax that the Ministry was bound to give way. In vain the Iron Duke inquired how the government of the country could be carried on without the tax. In vain Lord Castlereagh lectured his fellow-countrymen on their "ignorant impatience of taxation." Pitt had definitely stated in 1799, when he asked the Commons to vote the impost, that it was a war tax, odious in itself, but necessary to enable Great Britain to prevail against the Corsican. And so the nation had its way, and the tax came off incomes. Wherefore successive Chancellors of the Exchequer were at their wits' end. They tried all manner of indirect taxation, which was nearly all swallowed up in the expense of collecting it.

At last, in 1841, deficit after deficit made it necessary for Sir Robert Peel to be called in to prescribe for the sick national exchequer. He prescribed a dose of income tax—7d. in the £; but, like a wise physician, not wishing to alarm his patient, he proposed that it should be levied for three years only; and not in Ireland. Since that time, war or no war, the tax has been collected; and it is now recognised that it is the most economical of all taxes to the taxpayer, for it involves very little expense of collection in proportion to the amount raised. Since the enormous increase in the number of trading companies the expense has been much less than before, for these companies are legally bound to publish annual balance sheets showing profit and loss, and pay their income tax in one great cheque.

Having thus briefly sketched the history of income tax, let me now endeavour to show you how it is raised, **upon what basis it is levied**, and, indeed, the whole incidence of it. To begin with, the income tax is imposed annually by Parliament in the yearly Finance Act. This Statute occasionally makes a slight alteration in the liability of the taxpayer—for instance, from time to time, according to the financial necessities of the nation, the law is altered so as to exempt or partially exempt incomes of not more than a certain figure. But as a rule the only clause in the annual Act which is of any importance is that which fixes the rate for the year. The Income Tax Code, if I may so call it, is contained chiefly in three Statutes. Chief of these

is Sir Robert Peel's Act of 1842. Next comes Mr. Gladstone's Act of 1853, which extends the tax to Ireland, and greatly simplifies the law ; and last of all, the Taxes Management Act, 1880, which deals wholly with machinery—that is, the mode of collecting the tax, appeals, and matters of that kind. In addition, there are other Statutes bearing on the subject which will be referred to in their proper places.

There are **five classifications of income**, specified in the Act of 1853 under the names of Schedules A, B, C, D, and E. Schedule A deals with **landed property** in the United Kingdom. This is a tax on the owner, and includes not only land in the ordinary sense of the term, but also all that kind of property known as lands, tenements, and hereditaments in England and Ireland, and heritable property in Scotland. The duty is commonly called **"property tax,"** and is payable by the occupier ; but if that occupier is a tenant, he is allowed to deduct the amount from his rent. He must deduct it from his next rent. And any contract between a landlord and tenant that the tenant shall pay his rent clear of income tax is not binding. Neither is a contract binding by which the tenant agrees not to pay the property tax but to leave it to be paid by the landlord. So that as between tenant and State, the tenant is liable to pay. As between landlord and tenant, the landlord is liable.

To this rule there is an exception ; and that is that if any **house or building is let in different apartments or tenements**, and occupied by two or more persons under distinct tenancies, it is charged as one house, and the assessment made on the landlord in the first place. This exception applies to chambers such as are in the Inns of Court in London, and to flats and suites of apartments, furnished or unfurnished. The point is, that a room or sets of rooms in the same building are let out to different tenants as occupiers. Where the tenants are lodgers, the lodging-house keeper pays the tax ; but where the tenants are occupiers, the landlord is directly responsible.

There is an exception to this exception. It arises where a house is divided into distinct properties **owned by different owners**, and occupied by them or their tenants. In this case the collector charges the tax on each occupier, leaving him to deduct it from his next rent. Let me take a case that will illustrate how the law works with regard to these assessments of houses split up into different tenements. Suppose you have a building of four stories with one entrance from the street and a staircase, on each side of which there are distinct dwellings on every floor. This makes eight flats, or, as the Income Tax Acts call them, **"tenements."** If the whole building, to which access is gained by the said street door, is owned by Mr. Brown, the eight respective tenants of the flats will not be troubled by the surveyor of taxes to pay the income tax assessed upon the building which they occupy. The collector will call upon Mr. Brown ; but if Mr. Brown cannot or will not pay, the collector of taxes may be ordered by his official superiors to distrain upon the goods and chattels of the eight tenants, or any one or more of them. The one or more whose goods have been seized either pays the whole property tax for



the building or else has his goods sold. In either case his remedy is to deduct the full amount from his next rent.

Suppose, however, that Mr. Brown has sold the two top stories to Mr. Smith. In that case the tax will be demanded in the first instance, and collected from the tenant of each flat.

**Dwelling-houses of small value**—that is, under £10 a year—are always chargeable on the landlord, and so are all lands and tenements (including dwelling-houses and other buildings) **let for less than a yearly tenancy**. But in this case, as in the case of flats, the State reserves the right to come upon the occupier if the landlord cannot or will not pay, leaving the tenant to deduct the amount paid from his rent.

I ought, perhaps, to add that a tenant can only deduct property tax from his rent when he has actually paid the duty. And further, that, even though the landlord is entitled to exemption, the tenant may, if the tax is demanded, pay it, and leave the landlord to settle with the Inland Revenue Department.

The words "lands, tenements, hereditaments, or heritages" used in the Acts include **other things besides land and buildings** as commonly understood. For instance, fixtures, including machinery affixed to premises, form part of the land, and are therefore within the definition of lands, and are to be included in the assessment for the tax under Schedule A. Again, rights arising in or upon land are in England hereditaments. For instance, if the landlord of a farm lets the farm for agricultural purposes, but reserves the right of taking and carrying away game, this right of sporting is a hereditament, though the landlord pays no tax on the value of it. But if he lets the sporting right to another person, that person pays the tax and deducts it from his rent. In like manner, rights of fishing, rights of pasture, rights of mining, and, in fact, all rights to go on the land of another and take something from it for oneself are hereditaments, and the owners of such hereditaments must bear income tax on the annual value if they are let.

To take an example: Mr. Jones let a piece of land to Mr. Smith for the purpose of being used as a brickfield. The tenant was to pay a rent of £17 10s. per annum, and £100 a year for a royalty or brick-rent as the price of being allowed to take the clay and earth from the land for the purpose of brick-making. In addition, the tenant was to pay 2s. per 1,000 bricks over a certain number in any year. It was held that all these payments were really rent, and the tenant was liable to pay in the first instance the duty to the Government, and then to deduct it from what was due to the landlord.

In Scotland, **shootings and deer-forests** are dealt with by a Statute passed in 1886, which renders sporting lands subject to valuation for the purposes of all rates and taxes which are charged upon lands and heritages.

**What is the "annual value"** for the purpose of the Income Tax Acts? I have told you before (Book II., chapter iv.), that for rating purposes you have to take the clear annual value, which is generally less than the rent, because it represents what a tenant would pay for the place if he had to do every single bit of repairs himself and bear the burden of all the rates, taxes, outgoings, and expenses in connection with the property. But for

FORM OF CONVEYANCE OF FREEHOLD HOUSE AND SHOP.

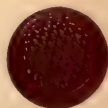
**This Indenture**

made the tenth day of March  
One thousand eight hundred and  
ninety eight **Between** Thomas  
Smith of 112 Castle Street Clapham  
in the County of London Butcher (hereinafter called 'the Vendor')  
of the one part and William Brown of 108 Sumner Road  
West Ham in the County of Essex Saddler (hereinafter called 'the  
Purchaser') of the other part **Whereas** the Vendor is seized of or  
otherwise well entitled to the hereditaments hereinafter assured  
for an Estate in fee simple in possession free from incumbrances  
**And whereas** the Vendor has agreed to sell the said  
hereditaments to the Purchaser at the price of One thousand two  
hundred pounds **Now this Indenture witnesseth** that  
in consideration of the sum of One thousand two hundred  
pounds on the execution of these Presents paid to the Vendor  
by the Purchaser (the receipt whereof the Vendor hereby acknowledge)  
The Vendor as Beneficial Owner **Doth** hereby grant to the  
Purchaser **All that** messuage house and Shop with the  
appurtenances known as 15 Clapperton Row in the Parish of  
St Mary Islington in the County of London now in the occupation  
of Sarah Links **To hold** the same unto and to the use of the  
Purchaser in fee simple **In witness** whereof the said parties  
hereto have hereunto set their hands and seals the day and year  
first hereinbefore written

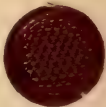
Signed Sealed and Delivered  
by the said Thomas Smith in the  
presence of

William Robinson, 12 Mercat Street, E.C.  
Stockbroker

Thomas Smith



William Brown



Signed Sealed and Delivered  
by the said William Brown in the  
presence of

Andrew McTavish, 14 Broad Street, W.  
Baker



Dated 10<sup>th</sup> March 1898

Mr Thomas Smith

to

Mr William Burn

Conveyance

of  
The said land and shop  
situate in the town of Kingston

the purpose of this tax, the Acts declare that "annual value" means rack-rent. "Rack"-rent is a term of law meaning full rent: the rent that may be fairly expected to be obtained from a tenant who is reasonable. In fact, the term "rack"-rent as applied to leases of land and houses is analogous to the "reasonable price" mentioned in the Sale of Goods Act when it says that when you sell goods to a man and do not fix the price, he shall pay you a reasonable price for the goods. I make these remarks because I know that many people imagine that a rack-rent is an excessive or exorbitant rent extorted by the landlord.

When the land (in which term I include the buildings on it) is let to a tenant in the ordinary way at a rent, that rent must be taken to be the rack-rent for the purposes of assessment, provided that the lease was made not more than seven years before the 5th of April in the year for which the assessment is made. Where the rent is merely nominal, however, or where the owner is also the occupier, the Commissioners must assess the property at the rent it would let at if let at a fair and full rent. And so, also, the Commissioners can go behind the rent actually paid if the lease is more than seven years old.

In **London**, the basis of assessment for the tax is not the rental, but the quinquennial valuation made under the Valuation (Metropolis) Act, 1869. By this Act a valuation of all landed property in the metropolitan area is to be made by the overseers every five years. The valuation can be seen by any ratepayer, who is at liberty to object if he thinks he has been over-assessed. The list is settled by the assessment committee of the parish or district, subject to the right of any ratepayer or the surveyor of taxes to appeal to the Sessions. When finally settled, the list comes into force on the 6th of April, and remains in force for five years, and during those five years the amount in the valuation list is deemed to be the annual value for the purposes of income tax under Schedule A. This valuation is to be the gross annual value of the property—not the net or clear yearly value.

In **Ireland** the tax is assessed not on the actual rental, but on the poor law valuation, which is less than the rental in most cases. And in Ireland, also, the person paying the tax is allowed to deduct any poor-rate he has to pay from the annual value of the land. Again, the Commissioners may levy the tax on the landlord in the first instance, if they please.

In **Scotland** there is also an exceptional provision. Under an Act of 1854, the Commissioners of Supply of each county and the magistrate of each burgh may appoint assessors to value all the land in the county or burgh for the purposes of local rating. Three years later, by way of saving the labour and expense of a double valuation, one for local purposes and one for national taxation, it was enacted that if the local authorities chose to appoint the surveyor (or surveyors) of taxes for the county or burgh to make this valuation, the valuation roll should stand for all purposes as showing the value of the property. This local option has been largely, if not universally, exercised. So that where a valuation roll has been made by the surveyor of public taxes, income tax under Schedule A is paid simply on the amount set



down in the roll, regardless of the actual rent or value of the property in question. But where the Government surveyor has not acted as assessor, the valuation roll is not worth anything as a guide to the tax that has to be paid. You fall back on the original plan of paying on the annual value, as explained by me on page 1056. In Scotland, also, if the landlord has to pay any of the rates and local burdens usually borne by the tenant, he may deduct them.

There are certain "lands, tenements, hereditaments and heritages" which may be called conveniently **business concerns arising out of land**, which also come within Schedule A, but are assessed on the annual profits. The tax in these cases is to be paid by the person, corporation, or company having the direction or management, that is, carrying on the concern. There are three divisions. The first is **quarries** of stone, slate, limestone, or chalk, and on these concerns the tax must be paid on the amount of profits received therefrom in the preceding year. It should be said that a slate quarry is taxed on this basis, even though it is worked by underground working, which is properly mining, and not quarrying. But the Act admits no difference because of the manner of working.

The second class comprises **mines** of coal, tin, lead, copper, mundic, iron, and other mines. "Other mines" means other mines of a similar character to those named, including, I should suppose, gold mines and others of a like nature. These are to be assessed on the average profits of the five preceding years. They have thus an advantage over quarries; for if a quarry makes a profit of £1,000 one year and a loss the next, duty is payable on the whole £1,000 made in the good year. Take a mine which makes a profit of £1,000 one year, then a loss of £800, then a profit of £500, and in the next two years a loss of £500 a year, no duty will be payable at all. For if you take an average on the five years' trading, you will see that there is a loss of £300. Had this been a quarry, duty would have been paid on £1,500, without allowing anything for the bad years.

When you set about ascertaining the profits of a mine, you are only allowed to deduct from the total output the expenses of working and management. If the mine-owner sinks a new shaft, or adds new machinery, he will not be able to deduct the expense from his profits for the year. Nor will he be permitted to deduct anything for depreciation in the value of the pit. By the Inland Revenue Act of 1878 (section 12), he may deduct such a sum as represents the diminished value *by reason of wear and tear* during the year of any machinery or plant used for the purposes of the concern. Note, please, that this is limited to depreciation by wear and tear—that is, by ordinary user of the machinery and plant. Suppose, for example, that a colliery owner in the first nine months of the financial year raises and sells 200,000 tons of coal at the price of 7s. per ton, and the working expenses—wages of pitmen, salaries of managers and clerks, keep of horses, and so on—cost (say) 6s. per ton, he has made a profit of £10,000. From this he is entitled to deduct a reasonable amount for depreciation in machinery caused by the ordinary course of working it. But suppose at the end of the ninth month an

explosion takes place at the colliery which blows to pieces £2,000 worth of machinery and renders it useless, this £2,000 cannot be deducted from the £10,000. Why not? Well, because machinery is capital. As a Scottish judge put it, "the machinery and buildings connected with a pit appear to me to be just part of the pit itself." And as the expense of providing new machinery is a capital expenditure, so the destruction of machinery is a capital loss. It is not, legally, a loss of profit.

It is intended, however, only to charge mines so long as they are going concerns. And if a mine fails entirely, the proper course is to represent that fact to the Commissioners of taxes, and they will discharge the assessment. And again, if a mine is decreasing in value (for example, when there were two seams of coal, and one seam comes to an end—a "fault," as miners call it), so that an average of the last five years' profits would not be a fair basis of assessment for future income tax, the Commissioners, on being appealed to, may take the last preceding year as the basis, instead of the five preceding years.

The third kind of hereditaments or heritages which are really business concerns arising out of lands are "**ironworks, gasworks, salt springs or works, alum mines or works, waterworks, streams of water, canals, inland navigations, docks, drains, and levels, fishings, rights of markets and fairs, tolls, railways, and other ways** [*e.g.*, tramways], bridges, ferries, and other concerns of a like nature" arising out of lands. A motley group, truly! And these are all assessable on the basis of the profits of the preceding year—just like quarries. It should be observed that when a municipal corporation is bound by Act of Parliament to supply water to the inhabitants, paid for by a compulsory rate, the rate is not "profits," even though the rate in any year is more than enough to pay the expenses of the water supply. But if the corporation, in addition to performing its statutory and compulsory duty, carry on the business of water merchants at a profit, they must pay tax on that profit. Take the case of Glasgow, for instance. The corporation of that enterprising city use Loch Katrine as a source of supply. They are bound to supply all the inhabitants within a certain area with water for domestic purposes, levying a water-rate which must be paid by the ratepayers whether they use the water or not. But they also supply manufacturers and others with water for purposes of trade and manufacture; and for this supply they charge, not a rate, but a contract price. They also supply water to certain suburban places and receive payment for it. Now the last two items are items of trade, not coming within the duty of the corporation as a municipal body; and in respect of these items they are in exactly the same position as a water company composed of private persons who carry on a traffic in water, not as a public duty, but for profit.

"Other concerns of the like nature" is a very wide term. It includes all businesses inseparably connected with land—which cannot be carried on without land, I mean. Thus, the Edinburgh Southern Cemetery Company was held to be such a concern, and liable to pay income tax on the basis of the last year's profits—these profits being derived from the sale of burial rights,



vaults, and rights of perpetual sepulture in the Company's cemetery. And when the Company claimed to be allowed to deduct from the year's profits the amount spent out of earnings in purchasing new ground and laying it out, and in improving the appearance of the graveyard, the claim was disallowed. This, said the Court of Session, was capital expenditure.

I should add that it is compulsory for companies and societies having the management of all concerns connected with land, including railways, to **deduct income tax from the profits** before paying the dividend to shareholders. And the tax paid is deducted proportionately from the dividends. Some companies pay dividends "free of income tax." This is misleading. What they have done is to deduct income tax from the whole profits, and share the balance.

When we come to consider Schedule D, you will see that all income arising from trade profits other than the concerns just mentioned is chargeable under that schedule. And if Schedule A did not include such concerns, they would fall within the words of Schedule D. There is no difference in the rate of duty payable under the two schedules. But it may make a very considerable difference whether you have to pay on your profits under D or under A. For those trades, manufactures, etc., which are not concerns arising out of lands pay duty on the average profits for the three preceding years; while those contained in the three classes under Schedule A are assessed as to the first and third classes on the basis of one year's profits, and as to the second class on the basis of five years' profits (*see* p. 1058).

To show you **how it works out**. You start in 1895 the business of a slate merchant, having a slate quarry. In 1895 your profits were £1,000. In 1896 your profits were £1,500, and in 1897 you lost £800. Under Schedule A your assessment for 1896 will be on £1,000, that being your profit for 1895. In 1897 your assessment will be on £1,500; and for 1898 you will not be assessed at all. Total duty paid in the three years at the rate of 8d. in the £ is £83 6s. 8d. Had you been assessed under Schedule D, as a trade, you would pay £33 6s. 8d. in 1896—*i.e.* on the full £1,000; because it is impossible to take an average until you have been in trade three years. In 1897 you would pay on the average of the two years—*i.e.* on £1,250 = £41 13s. 4d.; and in 1898 you would pay on £566, being your average for the three preceding years = £18 17s. 4d. Making for the three years £93 17s. 4d. You go on for another year, 1898, and make a profit of £400. Here the Schedule D man has the advantage; for while the Schedule A man pays duty on the whole profit of the single year, the other only pays on £366 13s. 4d., his average for the three years 1896, 1897, and 1898.

On the whole, it is more advantageous for a trader whose trade is not that of a quarryman, nor one of the miscellaneous lot (p. 1059), like iron-works and other concerns connected with land, to be taxed under Schedule D. But on the other hand, mine owners (I mean those who work the mines, not the actual owners of the soil) are better off still; for they can claim to be assessed on a five years' average instead of three years'. Again, a mine-owner can appeal for repayment of duty overpaid; and in doing so, can put in only

the last three years' profits—not five—though he is originally assessed on five years' gains. This pays him if his profits have been declining.

Canals, railways, and other public undertakings are assessed in one account at the place where the general accounts of the undertaking are made up. Thus, the Midland Railway pays not in each parish where it has a line or a station, but at Derby, where the Company's chief offices are. And where lands are in the same tax district, but different parishes, and let to or occupied by the same person, they may be included in one assessment, if the value of the lands in each parish cannot be certainly ascertained. Mines may be assessed either where they are situate or where the produce is made up or manufactured.

There are certain **deductions and allowances** made to landlords in respect of landed property under Schedule A. A parson is allowed to deduct from the annual value of his living the tenths, firstfruits, duties, and fees on presentation paid by him within the preceding year. So also ecclesiastical persons are allowed to deduct the amount expended by them for procurations and synodals on an average of the preceding seven years. And any person bound to repair collegiate churches and chapels, chancels of churches or colleges, or halls of a university, may also deduct the amount expended in the preceding year. Again, in estimating the value of a tithe rent charge, parochial rates are to be deducted. The only deductions to be made in respect of land itself are land tax, rates charged on land in respect of draining, fencing, or embanking the same; and the average of twenty-one years' expenditure in making or repairing sea walls and embankments to protect the land against the sea or a tidal river. When land is reclaimed from the inroads of the sea by building an embankment, the first cost of building the embankment cannot be deducted. But the subsequent cost of repairing the embankment can be deducted. Thus, a man had land liable to be flooded at every tide, sometimes more, sometimes less. It was only worth about five or ten shillings an acre annually. The owner built a sea wall which effectually kept out the tide and raised the value of the land to about £3 an acre. He claimed to be allowed to deduct the amount expended before paying income-tax on the annual value. But his claim was disallowed. The object of the embankment was to change the character of the land and so increase its capital value. Wherefore the expenditure was capital expenditure. But once the land was reclaimed, any expense in repairing the wall would be that kind of expense fairly allowable off the annual profits.

With regard to the concerns issuing out of land already mentioned, if the machinery or plant is let along with the quarry, mine, etc., and the lessor undertakes to repair it, he can claim repayment from the Inland Revenue of so much of the duty as represents duty on the diminished value of the machinery by wear and tear. But it should be noted that if the claim for repayment is not made within twelve months after the year of assessment, it cannot be allowed.

There are also allowances made for certain **public and charitable institutions**. The first is that colleges and halls in universities and the public buildings and offices of the college are not charged. Nor are the garden



walks and grounds for recreation if maintained by the college funds. Hospitals, public schools and almshouses, with the grounds, are exempt. But if any building belonging to a college is occupied by an individual member, or by a person who pays rent for it, it is assessable. And if any part of a hospital, public school, or almshouse is occupied by a person whose income is over £160 a year, or by anyone who pays rent, that part is assessable. To take an instance; in such places as county lunatic asylums there are generally suites of apartments or separate houses within the grounds occupied by medical officers, the chaplain, the superintendent, and others. If a doctor occupying one of these sets of rooms, is in receipt of a stipend chargeable for income tax, as a stipend of £160 a year, the set of rooms must pay property tax on the annual value. You see, the doctor's actual salary may be more than £160; but what is taken is the income-tax value of his income. You observe that "**public schools**" are exempt from property tax. This does not mean charity schools only. For instance, the City of London School is one where most of the scholars pay something. But there is generally a deficiency in the year, and that is made up by the Corporation of the City. A public school is one which is managed by a public body, is not carried on for profit, is a public foundation, derives a substantial part of its income from a charitable source, and in which no private person has any interest. Under this exemption will come most grammar schools.

The decisions as to hospitals seem a little conflicting. One hospital was established for the reception of lunatics. Rich and poor were received. The rich were charged considerably more than the cost of their maintenance and treatment, and the poor were charged less. The notion was to make the rich pay for the poor. In one year there were so many rich patients that the balance of receipts over ordinary expenditure was £7,000. This was all spent in extending and improving the hospital. Yet it was held to be profit, and assessable to income tax. But it would seem that the real question is not whether in one or two years an institution is able to pay its way by fees received from those who can afford to pay, but is the hospital a charitable foundation or not? If it is charitable, it does not pay income tax on its profits or on its buildings.

**Literary and scientific institutions** pay no property tax on buildings used solely for the purposes of the institution, when no payment is made. The Royal College of Surgeons, Edinburgh, once tried to escape from assessment on the ground that theirs was a scientific institution. But the Courts said, No. "You are a professional institution. Your body exists for the purpose of promoting the interests of your profession. True, you incidentally produce learned men and promote the science of surgery. But your main object is to assist your own class. You seek to benefit surgeons, not surgery." Such was, in effect, the decision. So that the Colleges of Surgeons and Physicians are placed on exactly the same basis as the Faculty of Advocates, the Inns of Court, and the Incorporated Law Society. On the other hand, as opposed to the Edinburgh College of Surgeons case, the Institution of Civil Engineers was exempted from assessment on its property, because the

main object of the Institution was the promotion of engineering as a science, and not the professional advancement of its members. I should say that a public free library established under the Public Libraries Acts by a municipal corporation is also exempt from assessment.

Last of all, and this is of the liveliest importance to **charitable bodies and trustees of charitable property**, the rents and profits of lands or heritages belonging to a hospital, a public school, an almshouse, or vested in trustees for charitable purposes, are totally exempt from property tax. The tenant who pays the rent is to deduct the property-tax and pay it to the Inland Revenue authority, but the hospital, school, almshouse, or charitable foundation can get it back on making an affidavit before one of the income-tax Commissioners. The claim must be made within three years, so that the best way to do is to make a claim every three years for return of the tax.

"Charitable purposes" is a very wide expression. As a rule, when men speak of "charity" they have in mind something to do with the relief of the poor. But this is much narrower than the legal significance of the word. An old statute of Queen Elizabeth gives a list of charities, which is always used as an index, though it is not an exclusive and conclusive list. They may be divided into four classes:—

(i.) Those having in view the **relief of poverty**, including the relief of aged, impotent, and poor people, the maintenance of sick and maimed soldiers and mariners, the education and preferment of orphans, "marriages of poor maids," the help of struggling young tradesmen, and the aid of decayed persons, and, last, the assistance of poor people in paying taxes.

(ii.) The **advancement of learning**, including the establishment and support of schools of learning, free schools, and scholars in universities. So that if a man gives a plot of land to trustees in trust to found a bursary at (say) Edinburgh University, it is a charity.

(iii.) The **advancement of religion**—*e.g.* the repair of churches and the endowment of a chapel.

(iv.) Other **purposes beneficial to the community**. Elizabeth's Act specifies the repair of bridges, paving causeways, sea-banks and highways amongst these other purposes beneficial to the community; and it can hardly be doubted that they were beneficial at a time when little provision was made for the performance of these public duties by local bodies out of local funds raised by rates. And in modern times it has been held that the British Museum, the Royal Society, the National Lifeboat Institution, and the Royal Humane Society are all charitable associations whose landed property is exempt from property tax.

When the tenant of charitable lands has paid the landlord's property tax and deducted it from his rent, **the proper person to apply for the return of the money** is some steward, agent, or factor acting for the charity, school, etc., or else the trustees (or one of them) in whose name the land stands as trustee for the charity. I mention this in detail because I have often been asked questions to which the above is the answer by officials of orphanages, churches, and hospitals.



**Unoccupied houses** are assessed just as though they were let; but the tax need not be paid for the time they are actually unoccupied, and if paid will be returned. Lands, on the other hand, are taxed on their annual value, whether cultivated or not. The much-abused and often-complaining Irish landlord has a little advantage over his British brother. The down-trodden Irishman only pays property tax on the rents actually received. The British landlord, on the other hand, is liable to pay the duty, whether he gets any rent or not. He is supposed to be able to obtain his rents if he cares to take the proper legal steps. Most people know that the great agricultural landlords of Great Britain have enough of fellow-feeling for their tenants to make an abatement of rent in a bad season. The Income Tax Acts admit of a corresponding reduction in the property tax when an abatement or allowance has actually been made.

In Ireland the rents are fixed by the Land Courts, and I do not know that Irish landlords make a practice of remitting any part of the judicial rent. Since I started to write this book, a gentleman has written to me suggesting that I should explain to my reader the Irish land laws. I am compelled to decline the task—first, because such an explanation would occupy about 500 of these pages; and, second, because I do not thoroughly understand those laws. An Irish friend, to whom I mentioned the matter, gravely told me that there is only one man who ever really mastered this intricate subject, and he is now in a lunatic asylum.

I ought to add that money charged on land is taxable in the same way as the land itself. Thus, if you have given a **mortgage or bond** on which you have to pay £20 a year interest, you deduct from each instalment of interest the income tax on that amount. So that if you pay half-yearly, you do not send £10, but £10 less 6s. 8d., being the interest less 8d. in the £ property-tax.

The next class of income tax, **Schedule B**, is a tax on lands and heritages, just as in Schedule A; but it is **borne by the occupier** instead of by the owner. This is practically a tax on the tenants of agricultural land; for all warehouses and trade buildings are exempted, and so are all dwelling-houses, except farmhouses let with farms. I do not mean to say that the only land chargeable to the tenant under this part of the Act is land used for the purposes of agriculture—that is, cultivated land—but I mean that people who occupy land as distinct from houses and business premises must pay under this schedule. For instance, a deer forest in Scotland comes under this heading. So do tithes and teinds.

But the **farmer is chiefly affected**; and it is at him that this part of the Act is aimed. A farmer or other occupier of lands, hereditaments, and heritages, is charged on the basis of the presumed annual value of the lands occupied by him. The assumption is that the occupation of land is a source of profit to the occupier, and that he derives an income from it. In 1842, Sir Robert Peel's Act fixed this presumed income at one-half of the **rent** in England and one-third of the rent in Scotland. In 1896, owing to agricultural depression, the charge was equalised and fixed at 8d. in the £ on one-

third of the rent, whether in England, Scotland, or Ireland. The income tax of other people was fixed for the year at 8d. in the £; so that a farmer or other occupier of such land as I have described pays income tax on a third of his rent. This rule is still fixed except for farmers.

The reason why an arbitrary rate was made in the case of tenants of agricultural land was because farmers were said to be not accustomed to keep accounts in the way that business men and tradesmen are. Therefore, as it would be impossible, or nearly impossible, for the Commissioners of income tax to find out what a farmer's income really was in the absence of books, and as it was presumed that a farmer would not occupy his farm unless he were making some profit, some standard had to be fixed for the purpose of taxation. The standard used was the rent. But, as everybody knows, farming is not what it used to be; and so in 1887 it was enacted that any person occupying lands for the purposes of husbandry only may elect to be assessed under Schedule D—that is, as a trader. The assessment of traders is treated of in a later part of this chapter. I would only point out here that a trader can only be charged income tax on his profits.

It follows that if a farmer's profits from his business are not so much as one-third of his rent, he had better choose to be assessed as a trader. To show the difference in figures, let us suppose a farmer paying £900 a year rent for his farm and farmhouse. He will pay income tax on £300 a year under Schedule B. Suppose his profits were not more than £200 last year, he had better claim to be assessed under Schedule D as a trader. If the surveyor of taxes sends him an income-tax form headed Schedule B, let him send a registered letter to the surveyor of taxes to the district to this effect:—"I elect to be assessed to the duties of income tax under Schedule D, and not under Schedule B, in respect of the farm occupied by me at Lowwood. SAMUEL JOHNSON." This notice must be sent within two calendar months after the commencement of the year of assessment; that is, the 5th of April. So that the notice of choice must be sent by the 4th of June.

**Nurseries and market-gardens**, for some inscrutable reason, are not charged in the same way as farms. A nurseryman or market-gardener is considered a trader, and is assessed under the same rules as any other trader—that is, on his profits. But when the amount has been fixed, the rules under Schedule B apply. On the other hand, a grazier is taxed on the basis of Schedule B, and so is a milk dealer, unless the Revenue think there is more to be got out of them by taxing under Schedule D, on the actual profits of their trade.

The next kind of income is the one assessed under Schedule C, and may be shortly described as **interest, annuities, and dividends payable out of public revenue**. This means dividends on Government stock or Government loans; and it applies to all public annuities payable in Great Britain, even though the public revenue out of which they are paid is not the public revenue of the United Kingdom. Thus, interest payable in London by the Government of India on an Indian loan is within the meaning of the section.



Stock, dividends, and interest belonging to registered friendly societies and to savings banks legally formed are exempt; and so are the stock and dividends of charitable institutions. Again, if a cathedral, college, church or chapel has an endowment to be used simply for repairs to the building, and that endowment is invested in public funds, no tax is charged on the dividends. The same rule applies to the case of money invested in Government stock for the repair of any building used solely for divine worship. I have already explained that the provident fund of a trade union invested in stock is exempted from income tax under this schedule. But as this exemption is not intended to benefit people who are able to pay, the exemption is not allowed where the society grants a larger benefit than £200 to any one member, or an annuity of over £30 a year.

Dividends and interest on foreign securities other than Government securities come under the head of foreign possessions (*see* p. 1072).

The great source of income tax is Schedule D, which deals with **property** (other than land in the United Kingdom) and income from **trades, professions, and callings**.

A difference is made in the Act (1853) between persons residing in and persons residing out of the United Kingdom. As the question of residence may be of importance to some of my readers, and, I hope, of interest to all, I will show the difference between the **taxable liability of residents and non-residents**. Persons residing within the boundaries of England, Scotland, or Ireland pay tax on their whole income arising either from property or from the exercise of a trade, calling, or profession. And the only difference between a trade or business carried on in the United Kingdom by a resident, and a trade carried on out of the United Kingdom by a resident in the United Kingdom, is that in the latter case the business is a "foreign possession" (*see* p. 1068). For instance, I have a friend who rejoices in the ownership of a silk factory in France, but he lives in England. And as he lives here and obtains the benefit of English law and English police to preserve him from domestic foes, and British ships and British armies to protect him from foreign enemies, he has the pleasure of paying every year to the commissioners of Her Britannic Majesty's inland revenue a slight percentage of those gains that are being accumulated daily in France and sent to him here. In like manner my friend has purchased house property in the same sunny country, and on the rents remitted to him here he also pays a little percentage towards the revenues of the empire.

Now, **persons not residing** in Ireland or the island adjacent thereto are still liable to pay income tax on the annual profits or gains arising from any property of any kind in the United Kingdom. And if any foreigner, though not living here carries on any profession, trade, or vocation within the United Kingdom, he must pay income tax on the profits of that calling.

So that it may be important for a man to know whether he resides in the United Kingdom or not. **What is residence** for the purposes of the Act? I daresay some of you think that this is an easy question to answer, and so it is in 999 cases of 1,000. But in the odd case it is not quite such an easy

matter to decide. Suppose a Scottish captain of a foreign trading ship, voyaging between Hamburg and Shanghai, or between any other two foreign ports. The captain sends his wife and children to live in Edinburgh, in order that the children may have the advantage of the facilities afforded by the modern Athens for education. The captain hires a house at Edinburgh for his wife and family, but he himself hardly ever comes there, simply because his calling will not allow him to do so. When he returns from the East to Hamburg he generally has to remain at that rising port to look after his ship. And he takes lodgings at Hamburg. Does the captain reside at Hamburg or at Edinburgh? For my part, I think he may be said to reside where his wife and family have their permanent home. At the same time, the question is not without difficulty.

A corporation, such as a limited liability company, "resides" wherever the business of the company is carried on. And by this I do not necessarily mean the place where the profits of the company are earned, but the place, practically, where the company has its headquarters. Thus, a company is formed and registered under English company law to establish a cotton factory in Yokohama. The board of directors consists of gentlemen all residing in or about London. The office is in London. But the whole business of the factory, both buying, selling, and manufacturing, is carried on in Japan. The dividends are also distributed from the Yokohama office, and most of the shareholders live (say) in America. Still, that company resides in England, though it does not do a stroke of business there except in the way of holding board meetings. Consequently the company must pay income tax on every pound of the profits.

There was a case in the 'seventies when the Inland Revenue alleged that the Imperial Ottoman Bank was resident in London. That institution is the state bank of Turkey, established under a decree of the Sultan, and having its seat in Constantinople. It had an agency in London, and many English shareholders. These shareholders appointed a committee of management, who controlled, at all events, the business of the London agency. It was decided that the bank was not resident in England, but in Turkey.

The Ottoman Bank was held liable to pay income tax on the profits made by the English branch, because, though not residing in England, the bank carried on business there, and was therefore liable to pay on the profits gained in exercising a trade within the United Kingdom. On the other hand, Messrs. Roederer, the famous champagne growers, were held liable to income tax on English profits in the following circumstances:—The firm had a considerable trade with England, and appointed a Mr. Blank their English agent. This gentleman took an office in his own name in London, employed travellers, and received orders for Roederer champagne. A small stock of wine was kept in London, out of which Blank supplied small orders. But if any considerable quantity of champagne was ordered, it was sent direct from France to the customer. The profits on these orders amounted to a large sum, and income tax was demanded on them. But Messrs. Roederer appealed from the assessment, on the ground that the profits were made in



France. But the Court decided that no business was carried on in England upon which the tax was payable.

Now let me direct your attention to the case of **income arising from foreign possessions**—this includes any possessions out of the United Kingdom. In this case duty is only charged on the actual sums received in each year in the United Kingdom. The great modern case is that of *Colquhoun v. Brooks*. Mr. Brooks lived in England, but had a sleeping partnership in an Australian firm. The firm had no branch within the United Kingdom. Mr. Brooks received as his share of the partnership profits a sum every year which did not represent the whole of his profits from the business. Part was retained in Australia and added to the business capital, to improve the business premises and for a reserve fund. The Revenue contended that as Mr. Brooks resided in England he was liable to pay income tax on the whole of the profits in the Australian business. But the House of Lords decided that Mr. Brooks's partnership share was a foreign possession, and that he was only liable for the amount actually received by him in England.

You observe that the tax is payable not only on the profits or gains of trades, professions, and employments, but also on the **profits of any "vocation."** "Vocation" is simply the Latin word for "calling." It is a very wide expression which includes any occupation in which a person is regularly engaged. It was once contended that a professional bookmaker who regularly attended race meetings and made a large income by betting was not liable to pay the duty on that income. His argument was that the only vocations recognised were lawful vocations. He said, in effect, "My calling is outside the law. If I win a bet, the law does not assist me to recover my winnings; and as my income is earned without the possibility of legal assistance, it is not one which ought to be taxed." But this plea did not avail. One of the judges went so far as to say that if a receiver of stolen goods made an income of £2,000 a year out of his nefarious calling, the Revenue commissioners would be bound to tax him on it.

Similarly, the **salary of a minister of religion**, though he is unable to sue for it, is the profit of a vocation. There are numbers of Nonconformist ministers whose salaries depend on the voluntary contributions of their congregations. Generally the governing body of the congregation engage the minister and promise him a minimum salary, but they are not understood to be individually and personally liable in law to pay it. In other words, should the contributions towards salary of one of these ministers fall off, that gentleman has no one whom he could compel to make up the deficiency. And I have heard it contended that he is, therefore, not liable to pay income tax. But this is a mistake. He is liable to pay on the profits of his profession or vocation.

It may be interesting to the clergy and ministers of religion to know that a distinction is drawn between salary, or donations by way of salary, and those **contributions made by societies to poor ministers**. Thus, if a curate receives a grant from the Curates' Augmentation Fund, that grant does not form part of his taxable income. The reason is that it is not part

of the profits of his calling. He does not, in other words, receive the money as payment for services rendered, nor because he is the curate of a particular parish, but as a charitable contribution because he is a poor and deserving curate. On the other hand, a minister who receives fees for weddings, christenings, funerals, or for performing any other of the offices of the church, ought to account for the sums so received. It is clear that they form part of the profits of his profession, however casual and uncertain they may be.

**How to estimate income for income tax** under the "trades and professions" clause is the chief practical difficulty of the tax-payer. Let me say at once that the Legislature in passing the Acts evidently contemplated the keeping of books and the preparation of a yearly balance-sheet by traders and professional men. I know that many persons do not keep books at all; and many only keep very incomplete books. Thus, many shopkeepers who do a ready-money business can only arrive at their profits approximately by comparing the stock in hand, the stock purchased during the year, and the takings, for they cannot, or at least do not, enter every item sold.

In the first place, you are taxed on the profits of trades, professions, employments, and vocations on **the average of three years' gains**. If you in your business make it a practice to balance your accounts once a year, the three years are counted back from that date. If not, from the 5th of April. If the trade, etc., began less than three years ago, you are assessed on the average of the time during which you have carried on the trade, etc. If you keep books, or are in receipt of a regular stipend or salary, you will have little difficulty in making out your return for the tax commissioners. **If you keep no books** you are rather at their mercy. Your best plan is to make out a statement year by year of what you consider to be your gross profits, and set-off against it the current expenses; that is, the amount spent by you in earning those gross profits. Thus you arrive at your net profits, and on these you will be taxed.

Let us see **what deductions can be claimed** by the trader or professional man in making his returns for purposes of taxation. The tax-payer is only entitled to deduct from his gross income the amount expended by him out of profits as being necessary to earn that income. If in the course of the year he loses money which forms part of his capital, and replaces the lost capital, he cannot claim any deduction on this account. For instance, Addie & Sons carried on the business of coal and iron masters. They claimed to deduct the cost of sinking pits; but the claim was disallowed on the ground that this was capital expenditure. Again, no deduction can be claimed for repairs of premises occupied for purposes of the trade or business, nor for supplying or repairing tools, utensils, and other articles used in the business, beyond the sum usually expended on an average of three years.

It is also the law that you must pay income tax on the profits of a business without deducting any **loss not connected with or arising out of that business**. Thus, Mr. Watt carried on the business of a seed merchant in Scotland. He also had a farm, which he worked in connection with his seed business. He made a profit as a merchant, but a loss on his seed farm. He



was not allowed to deduct the loss on one from the profit on the other. What he could do was to return the two as two separate businesses, and deduct his loss on one from his profit on the other in returning his total income from all sources.

Suppose you have a draper's shop in the City, doing a flourishing trade, and you set up another in the West End, where you do not flourish. So badly are you hit, in fact, that within the year you deem it best to clear out of the fashionable quarter, and so sell your lease, your stock-in-trade and fixtures, at a dead loss of £1,500. When you make your return of income tax, you may not deduct from the profit of the City shop the loss on your failing venture in the West End. It is a loss of capital.

A great many people start business on borrowed capital. It has been held, in a Scottish case, that a company which borrowed money for its business, repaying it by instalments, together with a bonus of 10 per cent. on the amount repaid, could not put down the 10 per cent. as a trade expense in estimating their profits under the Income Tax Acts. It is also the commonest thing in the world for traders to **borrow money from bankers** for short periods. For instance, I wish to make a large purchase of goods. If I pay cash, I shall get the benefit of a large discount of (say)  $7\frac{1}{2}$  per cent. ; whereas if I bought on credit I should get no discount. So I go to my banker, and, as I am a man he can trust, he lends me £500 for a month at 6 per cent. The invoice price of the goods is £900. With the aid of the banker's loan I obtain them for £832 10s. I clear off the loan at the end of the month, paying £2 10s. interest, and resell the goods for £1,200. In calculating my profits, I am not allowed to deduct the £2 10s. In the eye of the law this was not a necessary expense which I was bound to incur in order to make my profit.

And this is the test in all cases of trades and professions: **Was the expense necessary to earn the profit?** And, also, **Was it a current expense?** [That is, as distinguished from a laying-out of capital.] The Act, it has been said, contemplates that the trader or professional man shall make out a balance-sheet, "setting the receipts against the expenditure necessary to earn them." And again, "the profit of a trade or business is the surplus by which the receipts of the trade or business exceed the expenditure necessary to earn those receipts." When you have ascertained this surplus, it is taxable, and **it matters not what becomes of the profits** after they have been earned.

For instance, a man may make a profit in the way described, and apply part of it in extending his business premises—that is, he adds it to his capital. Or, again, he may have bought the business from someone in consideration of paying that person an annuity out of the profits. Or he may be legally bound to make an allowance to the widow of a deceased partner. Or he may contribute something to a provident fund for the benefit of his workmen. He will not be allowed to deduct either the part applied by him as capital, or the annuity, or the contribution to the provident fund in filling in his income-tax return.

A business man may deduct **the rent or value of premises used as**

**business premises.** But he may not deduct the rent of his dwelling-house. When a trader carries on business at one address and lives at another, the matter is fairly clear. For then he takes off his profits the whole rent of his shop, offices, warehouse, etc. The trouble arises in cases where a man uses his residence partly as a place of business. This applies to shopkeepers who live over their shops, dressmakers who use a room or two in the house as workrooms, commission agents who transact their business at home. In all these cases, the tax commissioners may allow the tax-payer to deduct as a trade expense a part of his rent. This part ought to be a fair proportion of the total rent paid for the premises, varying according to the proportions in which the house is used for business and residential purposes. But in no case can more than two-thirds of the rent be allowed. If I were a shopkeeper living at the shop, I should base my claim in this way: I should take the total rent—say, £100. Then I should say, I use rather more than half—about three-fifths—of the whole establishment as shop and storerooms. This leaves two-fifths of the premises as living room for myself and family—that is, £40 a year. But—stay, I have two assistants who live in, and they have one bedroom between them for their exclusive use. Deduct the fair annual value of that room, unfurnished, not as though the two assistants had hired it as lodgings, but in proportion to the whole rent paid. This may be about £5 a year. By these means I arrive at £65 as my business rent, and I accordingly set it down as a business expense when I make my income-tax return.

When a trader is merely a tenant at a rack (full) rent, there is little or no difficulty in ascertaining how much he is to be allowed to deduct on account of his premises. The difficulty arises **when the trader is owner of his business premises**, or when he is a sort of part owner. Thus, a tradesman in the West End of London purchased the twenty-one years' lease of his shop. He had to pay £250 a year as ground rent, and he gave £34,000 for the lease. He said, "As every year passes, my lease becomes less valuable to me. I am, in fact, paying £34,000 as a rent for the twenty-one years, and I claim to divide £34,000 by twenty-one and calculate the figure thus obtained as rent in addition to the £250 ground rent." This would have made his rent work out at (about)  $£1,600 + £250 = £1,850$  a year. For my own part, I cannot see why this was not accepted as a correct estimate. But it was not. The premises were assessed to property tax (Schedule A, p. 1057) at £1,000 a year annual value, and the Court decided that the trader was only entitled to deduct £1,000 as the expense of his business premises. This is construing the Act rather narrowly. "Rent or annual value" is the phrase used; and as the tax-payer evidently was entitled to deduct more than his rent of £250, the Court in effect declared that the annual value was not what he actually paid, but what the annual value was declared to be in taxing the landlord.

**Duty on income from foreign possessions** is also chargeable under Schedule D on the average of the last three years. But the tax-payer, who derives an income from foreign or colonial possessions, is only taxed upon the



actual sums received in the United Kingdom. The income may be received in the United Kingdom either in money or money's worth. "Possessions" is not a technical word, but the widest and most comprehensive word to describe property, or any other source of income whatever. Thus, a man living in England was partner in a business carried on wholly in Australia. It was held that this was a foreign possession, and that he was only bound to pay income tax on such a sum as he actually received in the United Kingdom.

In the same way, **interest on foreign and colonial securities** counts as income from foreign possessions, unless they are foreign government securities, the interest on which is payable in the United Kingdom (*see* p. 1065). But in this case the tax is payable on the full amount of the interest received within the United Kingdom in the current year, and not on the average of three years.

Then we have duty in respect of **profits of an uncertain annual value**, except those charged in Schedule A (pp. 1058 to 1061). The duty is to be charged on the full amount of profits or gains of the preceding year without deduction. And the same rule applies to income consisting of the interest of money and interest which is not annual interest payable out of public funds. Thus, if I lend a man £100 on a bill at three months, bearing interest at 10 per cent., the £2 10s. interest is assessable. Under the same heading of "uncertain profits" comes the assessment of the income of **cattle-dealers and dairymen**. In the ordinary way, these persons would pay on one-third of the rents of their lands. But as they are rather traders than farmers, the taxing authority can call for a return of the actual profits of the business and make the dairyman or cattle-dealer pay on the average of three years' profits.

Last of all comes the sweeping clause under which are taxed all **profits or gains not falling under any other rule**. This is a kind of trawling-net designed to catch all manner of fishes. Some people are quite ignorant of this clause, and feel aggrieved when they feel the application of it. For example, I heard the other day of a clergyman whose father had written a book, the copyright of which he bequeathed to his son. The clergyman occasionally cast up accounts with the publishers of the work, and, as the book was a popular one, he generally came away with a substantial cheque representing the royalties. This he did for many years until the income-tax commissioners somehow got wind of it, and promptly swooped down and demanded an account of these cheques for the past six years. The clergyman was astonished. He said, "I am not a professional author; nor is this a regular source of income as stocks and shares would be. Sometimes I only receive a few pounds in a twelvemonth. At other times I find myself entitled to considerably more. I pay income tax on my tithes as a clergyman. What more do you want?" And it took some time to convince the reverend gentleman that these casual and irregular incomings were such as he must pay income tax upon.

Repayment of a loan or debt by yearly or half-yearly instalments does

not make the instalments "interest of money" or "other annual profits or gains." For instance, a lady sold a share of a coal mine for £50,000, payable £3,885 down and the rest by instalments of £768 11s. 8d. every half-year for thirty years. The income-tax commissioners claimed to tax these instalments; but the Courts held that each instalment was the payment of part of a debt. It is as though I lent you £100. When you repay me, the repayment is a repayment of capital: it is not a profit or gain to me.

Last of all, we come to Schedule E, which deals with **the salaries of public officers**, and all annuities, pensions, and stipends payable by Her Majesty out of the public revenue of the United Kingdom.

When the Act uses the expression "public" office or employment of profit, it is not intended to confine the operation of the schedule to Government officials and the like. There are also included persons in the employ of corporations and companies of a public nature, railways, public institutions and foundations, and any town, burgh, city, or county council, or other local governing body. But it has been decided that servants in the lower grades of employment, paid by weekly wages, are not under this schedule, but under Schedule D (see pp. 1066-72). The difference is somewhat important, for under Schedule E the employee is assessed every year on his salary of the preceding year, while under Schedule D he is taken on a three years' average. To put this into figures:—Jones is in the employment of the Muford Junction Railway Co. as a superior clerk in the goods department, at a salary of £200 a year payable quarterly, and rising by annual increments of £10 a year, provided that he gives satisfaction. The first year he will be assessed on £200, next year on £210, next on £220. Now suppose you have a foreman engineer in the engine-shop of the same Company, who receives nearly the same amount per annum, but payable as weekly wages—that is, £3 15s. a week the first year, £4 a week the second, and so on, rising 5s. a week each year, which is £13 a year. The first year he will pay on £195, the second on £201 10s. (*i.e.* not on his actual wages of £208), and the third year on £208 (his average for the three years). So that the engineer, being assessed on the three years' average, pays in the third year on £208, or £12 less than the clerk; though the engineer's actual earnings during that year were £221, while the clerk received but £220.

Amongst **the persons assessable** under this schedule are, for instance, a bank agent and the master of a National or Board school. So also a master in any school of a public character, whether it be Eton or Winchester on the one hand or an orphan asylum school on the other, is a "public officer." And a clergyman or minister is on a similar footing, as is also an organist and choirmaster. To show the working of the tax, and how to make up a return, let us suppose a musician, who plays the organ at the parish church on Sundays, having been engaged as organist at a salary of £60 a year. On week-days he gives music lessons, and also plays at concerts and entertainments. The income from teaching and playing at concerts will be assessed on the three years' average as being the profits of a "vocation"—namely, that of musician—while the salary as organist must be assessed each year.



Upon what does the "public officer" pay?—Well, the Act says that he shall pay on all his "salary, fees, wages, and perquisites whatsoever" arising from his office. On his salary he pays, as I have said, by the year; but on perquisites he is assessed on the average of three years. Let me say that "perquisites" means, practically, money perquisites. For example:—A bank agent of a Scottish bank, who managed a branch business, received a salary of £— a year and his residence rent free. That is, only the ground floor of the bank premises was used for business purposes, while the other floors were fitted up as a dwelling-house for the residence of the bank agent. This gentleman was obliged to live there as one of the terms of his engagement; for, as in most banks, I believe, it was considered necessary that some trustworthy person should be on the spot night and day. The income-tax surveyor charged the bank agent income tax on the annual value of the residence. The principle was this:—You receive, as part of the emoluments of your post as a bank agent, a house rent free. This is either part of your salary or else a perquisite, and you must pay on the value of it. But the Courts held otherwise. They said, "This bank agent is obliged to live at this house. It may be that he would rather not live there; and that if he were allowed the choice he would rather accept the same money salary and live elsewhere. He is not allowed to sub-let the house, nor to take in lodgers, nor to make any profit out of it. It is not 'salary,' nor 'wages'; it is not 'fees'; it is not 'profit,' because for anything we know he loses by it; and it is not a 'perquisite.' A perquisite means something extra in the nature of a tip, or special reward; and it can hardly be called an extra reward for a man to be compelled, as a condition of his employment, to live in a particular house."

If a public officer has his **salary raised**, or in fact receives additional fees, profits, and perquisites in the year, the commissioners of taxes may assess him in an additional assessment.

The only **deductions** allowed off the emoluments of a person assessed under Schedule E are the "*expenses necessarily incurred*" by him in the performance of his duties. The phrase italicised has very much the same application as it has in the case of a trader. A trader is allowed to deduct from his gross profits the amount swallowed up in earning those profits—for instance, a shopkeeper must hire a shop, and the rent of it is a necessary expense to enable him to earn his income. But one must be careful to draw the line between expenses actually incurred and expenses necessarily incurred. Only the latter are allowed to be deducted, as an instance or two will make plain.

Mr. and Mrs. Smith were school-teachers. He taught the boys, and she looked after the girls and the infants. As they were both away from home the greater part of the day, they hired a maid-servant to superintend the domestic arrangements of their house; and when their joint income was assessed for income tax, they deducted the servant's wages as an expense necessarily incurred by them. For, said they, unless we had such a servant, Mrs. Smith could not go out to teach. But the Court refused to allow the deduction. Their servant, their lordships held, was a domestic convenience

only. Now, suppose Mr. Jones holds the office of clerk to the District Council, at a salary of £400 a year, and, by reason of the amount of work involved, he has to employ a man to do clerical work, paying him £75 a year. Mr. Jones may deduct the £75 from the £400. You see, the clerk is necessarily employed to enable Mr. Jones to earn his salary.

Again, Mr. Robinson, who lives at Bristol, is made a director of the Seamless Soap Company, Limited, at a salary of £300 a year. The Company's offices, where the board meetings are held, are in London, and Mr. Robinson travels up to London once a week to attend those meetings. The Company's articles declare that £5 shall be docked off the salary of each director every time he fails to attend a meeting. So that it may be said that regular attendance is necessary to enable Mr. Robinson to earn his £300 a year. Still, his railway expenses are not a "necessary expense" which he can deduct from the salary when he returns it for income tax. In the same way, a solicitor who lived at X held an appointment as clerk to the magistrates who assembled weekly at Y, some thirty miles from X. Mr. Solicitor was not allowed to deduct from his salary the weekly travelling expenses between X and Y.

The principle of these two cases is this:—It was not necessary for the director in the one case, and the magistrate's clerk in the other, to live at a distance from the place of employment. When I say it was not necessary, I mean that it was not necessary for a director of the Seamless Soap Company to live at Bristol in order that he might be such director. Neither was it necessary for the clerk to the magistrates at Y to live at X in order that he might perform properly the duties of his office. As well might a London merchant who lives at Brighton, and travels to and from London Bridge every day, claim to deduct from his profits the price of his season ticket as a necessary business expense.

**Exemption of small incomes.**—The modern policy of the Income Tax Acts is to exempt from the tax the incomes of those persons who do not receive more than a decent subsistence. It is interesting to observe, as denoting the increase in the standard of living, that the amount of this exemption has been and is being raised from time to time. The early Income Tax Act taxed all incomes over £50 a year. Then the figure was raised to £60; then to £150; and by the Finance Act, 1894, to £160. So that anybody whose total income arising from sources accessible under the Acts does not exceed £160 a year can claim either not to be assessed at all, or, if income tax has been paid on any of his annual revenue, he has the right to demand that it should be returned. For instance, if my income consists entirely of the rents of houses and lands, the tenants will pay the property tax and deduct it from the rent. Or if my income, being not more than £160, is derived wholly or partly from dividends on shares in a company, the company will deduct income tax before paying the dividends. It is my duty in these two cases to make application for the return of what has been paid.

Besides this total exemption, there is a **partial exemption or abatements** on incomes not exceeding £500 a year. If the income is not more than £400, he is entitled to an abatement on £160 of it. Thus, if my



income is £350 a year, I only pay on £190. A person whose total income is not over £500, but more than £400, is only entitled to an abatement of £100 of it. Thus, if I have £450 a year, I pay income tax on £350.

In assessing a man's income for the purpose of exemption or abatement, the Revenue authorities are only entitled to take into account the taxable income. Thus, if a curate has £120 a year of stipend, and a grant of £50 a year from the Curates' Aid Society, his taxable income being only £120, he goes scot-free. Again, a foreign resident carrying on a business in England, and making £400 a year profit out of it, is entitled to an abatement of £160, though he may have another business abroad from which he derives large profits.

**Deductions of life insurance and annuity premiums.**—Every person, be his income big or little, is entitled to deduct from it the amount of any premium paid by him on a policy of life insurance. The Income Tax Act of 1853 also says that he may deduct a premium paid by him for a life insurance of his wife. I would point out, however, that although a woman may insure her husband's life for her own benefit, a man may not insure his wife's life unless he has a pecuniary interest in it. Besides life insurance premiums, you are allowed to deduct from your total income any premiums that you may pay in order to secure an annuity at some future time for yourself or your wife. This covers that favourite form of insurance policy by which you contract for an annuity when you attain sixty-five, or a lump sum to your wife or family if you die under that age. Let us see the **limits of the exemption**. In the first place, it does not apply to an insurance with a **foreign company**, even though that company has an office in England. Again, the annual premium paid, or, rather, the premium allowed to be deducted, must not exceed one-sixth of the total profit income of the taxpayer. And last of all—and this is not, I think, generally known—you cannot, by deducting your insurance premium, bring your income below taxing point or within the limits of abatement. To explain, if your salary is £180 a year, and you pay an insurance premium of £21, you cannot claim total exemption on the ground that your income is less than £160. In this case it would work out to the same thing in the end; because you would be assessed on £20 and then claim to deduct £21. But if your income is £420 and you pay a premium of £30, it works out in this way:—You are assessed on £420 less £100 (see p. 1075) less £30—i.e. on £290. Whereas if you were allowed to deduct the £30 first, so as to bring yourself below £400, you would then be entitled to an abatement of £160—that is, you would only pay tax on £230.

**Joint income of husband and wife.**—In modern times a husband and wife are not so much one in the eye of the law as they used to be. But for some purposes conjugal unity is preserved, and amongst those purposes is that of income tax. For the total income of husband and wife is counted as one income for purposes of taxation. There is, however, one exception, and that is in favour of the business woman. It only applies when the total joint income is not over £500. When the joint income does not exceed that figure, and part of it arises from the profits of any business, profession,

employment, vocation, or office in which the wife personally labours, an exemption may be claimed. But first it must be shown that the rest of the total joint income or part of it is earned by the husband. That is to say, all or part of the wife's income and all or part of the husband's income must be personal earnings from some business, profession, employment, or calling. The wife's income arising from such business may then be treated separately. Thus, if she is (say) a schoolmistress at a salary of £100 a year, that income is entitled to total exemption because it is less than £160. Suppose the husband is a schoolmaster at £150 a year, he is also entitled to total exemption. Let me show by one or two instances when and how far husband and wife may claim separate taxation. Jones is a shopkeeper, who has made an average profit on the three years of £300. His wife is a dressmaker, and her average profits have been also £300. Their joint income is assessed, because they do not come within the £500 limit. Wherefore they pay on £600.

Smith is a clerk in a bank at £200 a year salary. His wife is sleeping partner in a business, the share of which was left to her by her father. She takes no active part in the concern, but draws on an average £200 a year as her share of the profits. The joint income of £400 is assessed.

Robinson derives a profit of £200 a year from his butcher's business, which he manages himself. His wife has a little bonnet shop which she manages herself, and out of it she makes £100 a year. She has also an income of £100 a year from another business in which she is a sleeping partner. The last-mentioned £100 is added to the husband's income, because the wife does not personally labour to earn it. But the £100 annually derived from the bonnet shop is assessed separately; and as it is less than £160, nothing at all is payable upon it.

Last of all, if the husband's business is connected with the business of his wife, the joint income is assessable. I have known cases like this: Mr. and Mrs. Boniface keep the "Rising Sun" hotel. The lady found the money to start the business, and she labours in it as manageress, looking after the maidservants and occasionally attending to customers. Boniface also occupies himself in the business of the hotel, and he and his wife make equal division of the profits. In any case, the income of Mr. and Mrs. Boniface is assessed as one income.

**How to claim exemption or abatement, and how to appeal against over-assessment.** The management of the income tax is in the hands of three authorities—namely, the Surveyor of Taxes, an officer of the Inland Revenue Department, who is sent down to each district to look after Government interests; the General Commissioners, a body of local gentlemen appointed by the Land Tax Commissioners out of their own body, and independent of the Government; and the Special Commissioners, who make assessments under Schedule C (p. 1065), and also Schedule D (pp. 1066-73), when the taxpayer elects to be assessed by them instead of by the General (local) Commissioners. These Special Commissioners are Government officials, whose address is "Somerset House, London, W.C."

I daresay most of you have noticed, when you have taken the trouble to



read the paper sent annually for you to fill up, that you are asked whether or no you prefer to be assessed by the Special Commissioners. If you do not declare your option in favour of such an assessment, the local body will assess you. As a rule there is no advantage in being assessed by the Special Commissioners. Quite the contrary, in fact, for that worshipful body generally puts you to no end of trouble, and probably shortens your life if you are at all of an impatient disposition. Still, I have known cases in which I have advised people to try the Special Commissioners, of which the following is a sample:—

Worthy Mr. Smith came to me, vowing and declaring that the system of taxation was grossly unfair. "Fancy," said Smith, "putting the income-tax assessments into the hands of that fellow Jones." Here followed some highly flavoured observations on the moral and intellectual character of the said Jones. As a matter of fact, Smith and Jones were old enemies, and Jones happened to be one of the General Commissioners for Smith's district. Smith solemnly assured me that he was paying on more than his real income, but that the General Commissioners simply laughed at him when he said so. The amount was not worth the trouble and expense of an appeal to law, and I advised Smith to pay that assessment, and the next year to fill in, in his income-tax paper, the declaration that he wished to be assessed by the Special Commissioners.

In point of fact, a taxpayer who feels that the local assessors are treating him unfairly, or on a wrong legal basis, had better appeal to the Special Commissioners. From them he will receive the fairest possible treatment. He is dealing with experts who thoroughly understand their work, and will, without being asked, make every allowance that the letter of the law enjoins, but no more.

There are, I believe, persons who regularly prefer to be assessed by the Special Commissioners, because they do not like to open their accounts and disclose their business to the General Commissioners, who are their neighbours, and may also be their rivals. I do not think much of this reason. To begin with, every General Commissioner is sworn to secrecy, and is liable to a heavy penalty if he divulges anything learned by him in the course of his duties. Again, the General Commissioners are usually, if not always, men of position and repute in the neighbourhood. And, on the whole, one is far more likely to be favourably assessed by his neighbours than by three officials at Somerset House. In Ireland there are no local Commissioners, but all assessments are made by Government officials.

Let me impress upon you one thing, and that is to **be in time**. You receive every year a yellow paper upon which you are required to make your income-tax return, and on the paper you will find a date specified as the last date for making the return. If you do not send in your paper by that time, the assessor of income tax does this:—He assesses you at the amount upon which he thinks you are liable under Schedule A (property tax), Schedule B (tax on the value of occupation of lands, *see* p. 1064), and Schedule E (public offices and Government pensions, p. 1073). The assessor also estimates

the amount of your taxable income under Schedule D—that is, from your trade, profession, or vocation, from foreign possessions, and from profits of an uncertain annual value. This estimate he sends to the local Commissioners, and they send it to the surveyor for him to look over. If it be found right by the surveyor, according to the best of his knowledge, you will receive another paper saying that you are assessed on (say) £350 a year, and that you are requested to pay £6 6s. 8d., being the tax on £350 less £160.

Now it may be that your income is not so much as £350 a year, and that you are able to prove it. Your proper method is to **appeal against the assessment**. The local Commissioners cause a general notice to be put up in their office, and copies to be affixed on the door of the parish church, limiting the time for hearing all appeals. Your best plan is to go to the surveyor of taxes for the district and ask him what is the last day for sending in appeals. For you must always **give notice** to the Commissioners that you intend to appeal, and the notice must arrive at the office of the clerk to the Commissioners ten days before the last day limited for appealing. This notice need not be a “lawyery” document. It is enough to say, “To the Commissioners of Taxes. Take notice that I intend to appeal against my assessment to Income Tax under Schedule D. JOHN B. JAMES, 12, Plow Road, Marlton.”

The next step is that you receive from the Commissioners a notice stating that your appeal will be heard at such a place, on such a day and hour. You must attend the appeal personally. No solicitor or barrister is allowed to appear for you; but if you are prevented by sickness, you may send a clerk, or agent, or your wife, or anybody (except a person practising the law) who has a personal knowledge of your business and income, taking care to send also a doctor's certificate to show why you cannot attend personally. You may be put upon oath, and required to swear to the truth of your statements. Sir William Davenant once said that in matters of taxation oaths were little regarded. And this is lamentably the case. So that, as a rule, the Commissioners require more than your bare word and oath.

You should **always produce your books**, if you have any. If you do not keep a ledger and a set of books, your banker's pass-book may help you out. Then you can point to your mode of living. You can say, fairly, “Do you think that if I made £350 a year I should live in a £20 house and keep no servants?” As I have said before, the Commissioners find it easy, and the taxpayer finds it easy, to secure a fair assessment when proper books of account are kept. When none are kept, a man may be over-assessed, he may be under-assessed. If he is over-assessed, the only thing he can do is to say to the Commissioners, “Gentlemen, I demand to be sworn”; and when he is sworn, to say, “You have assessed me at £350 a year. I swear that my income is no more than £250 [or whatever it is]. And I am prepared to answer any questions you like to put to me.” The surveyor of taxes and the assessor who made the assessment may attend and support the assessment appealed against. I may say that if, on the hearing of the appeal, the Commissioners think that the taxpayer has been put down for too little, they may increase his assessment.



When the appeal has been heard by the local Commissioners, their decision is final, except that you may **appeal on a point of law to the Courts.** This you do as follows :—Immediately on being informed of the decision against you, you ask the Commissioners to “state a case” for the opinion of the High Court. They are bound to do this if they are asked; but only if a point of law is involved. You pay a fee of £1 to the clerk to the Commissioners, who is always a solicitor, for preparing the “case”; and he sets out concisely the point in dispute, and sends a copy to you. You transmit this (of course, you employ a lawyer to do it) to the High Court [Court of Session, in Scotland] within seven days of receiving it from the clerk, and in due time your appeal is heard. As this is a process that may prove expensive—for the Court may order you to pay the costs and expenses of both sides, if you lose—it is not worth while to enter upon it unless a large sum is involved, or unless the decision involves a large class of persons, and you have some society or association backing you.

**Recovery of duty over-paid.**—Income and property tax over-paid will always be returned by the Revenue when you prove that it has been over-paid. This generally happens in this wise :—You have a small income arising from house property, and the interest and dividends on investments. Your tenants in the one case, and the person or company who pays your interest and dividends in the other, pay the tax before sending you your money. Let me take a case. Mrs. Brown has been left a widow, and her income is derived as follows :—£30 a year from a house; 6 per cent. interest on £500 invested in debentures of a brewery company; and dividends amounting to about £25 a year on some shares in the Palpitating Blind Company, Limited—altogether, £85 a year. So that Mrs. Brown is not liable to pay income tax at all. But the tenant of the house pays property tax, deducting it from the rent—(say) £1. The brewery company deducts and pays tax on the debenture interest—(say) £1; and the other company deducts and pays tax on the annual dividend—(say) 16s. 8d. Now Mrs. Brown is entitled to have that £2 16s. 8d. repaid to her every year. To get it, she must send to the Inland Revenue (Income Tax) Department, Somerset House, London, or the local surveyor of taxes, for forms to be filled up. On these forms she makes a statement of her total income from all sources. Then she sets down the amount of tax deducted, and the nature of the property on which it has been paid, and sends it in to the local surveyor or to Somerset House. When Mrs. Brown receives her interest and dividends on her debentures and shares, she will receive at the same time coupons signed by the secretary of the company, certifying that the tax has been paid. These coupons she must send in with the claim.

Every claim for repayment of duty must be made **within three years** of the end of the year of assessment. I may say that when a claim has once been proved, there is very little difficulty in obtaining a repayment of the duty in any future year. A form for future use is sent with each repayment. This form should be carefully preserved and used when a new claim is made.

## INHABITED HOUSE DUTY

is a duty charged on all inhabited houses, varying according to the value of the house, and the purpose for which it is used.

**What is assessed.**—All the “house,” together with the domestic offices (such as coach-house, stable, dairy), and all the yards, gardens, and pleasure grounds belonging to and occupied with the “house,” but not exceeding one acre of land, are to be assessed for the purpose of this duty. For instance, a hotel keeper named Douglas leased a hotel in (I think) Campbeltown from the Duke of Argyll. Trade increased and Mr. Douglas found that he had not sufficient stable accommodation for his customers, so he took another lease of some stables adjoining his house. The stables were used for the purposes of the hotel. Mr. Douglas claimed to be assessed to the Inhabited House Duty separately on the premises comprised in each lease; for the reason that had the stables been assessed separately they would have been exempt from the tax altogether. But the Lords of Session held that the stables were “occupied with” the hotel within the meaning of the Act and that Mr. Douglas must pay on the basis of the combined rents.

**Houses**, in the ordinary sense of the word, are assessed differently according to rental. If you occupy a house at a rack rent (*see* p. 1057) of £20 or less, you pay nothing. If your rent is over £20, and not more than £40, you pay 3d. in the £. Over £40, and up to £60, you pay 6d.; and over £60 you pay 9d. Thus, for a house with a rent of £45 a year, the tax is £1 2s. 6d.

**Shops**, which are also used with, and connected with, dwelling-houses; **hotels, refreshment, lodging-, and farm-houses**, are assessed at a lower rate. This is 2d. in the £ where the rent is between £20 and £40; over £40, and not over £60, 4d. in the £; and over £60, 6d. in the £. Premises used solely for the purposes of trade, such as warehouses, lock-up shops, counting-houses, and the like, are totally exempt.

The tax is **levied on the occupier** of the house, and he cannot, as in the case of the property tax, deduct it from his rent. There is nothing unlawful in the landlord and tenant agreeing that the landlord shall pay instead of the tenant. But even then, the right of the tax-collector is to collect the duty from the tenant and leave him to settle with the landlord. In the majority of cases it is easy enough to decide **who the occupier is**; but not always. For example, take the steward of a working man's (or any other) club. He and his family reside on the club premises and have their home there. But he only lives there as part of his duty; and if he is dismissed from his stewardship he by consequence quits the club premises. Again, even without dismissal from his post, he may at any time be told to pack up and betake himself to other quarters, because the club require his rooms for another purpose. The steward, therefore, is not the “occupier” within the meaning of the Inhabited House Tax Act. His occupation is the occupation of the club; and the club must pay the duty.

It is just the same if I have a house and servants, and I go away on a



tour, whether for business or pleasure, for a year or two, leaving the servants in the house to look after it and a housekeeper to look after them. In the eye of the law I still "occupy" the house—not myself physically, but by my servants. And so when one man occupies a house merely as a servant of another, the employer is the legal occupier, and he must pay the duty.

I ought to add that a house used for trade purposes only does not become an "inhabited" house, and liable to duty, merely because a caretaker is left in charge of it at night, and resides on the premises.

I should say that where a house (which means a building) is separated structurally into different tenements, and some of the tenements are used solely for business purposes, and others for residential purposes, the duty is only payable on the residential part. But the separation must be structural. It is not enough that the tenements are let to different tenants.

**Market gardens and nurseries**, even when occupied with a dwelling-house, are totally exempt from this duty.

## CHAPTER IV.

### VARIOUS PUBLIC AND PRIVATE RIGHTS AND DUTIES: BEING A CHAPTER OF MISCELLANEOUS LEGAL INFORMATION.

Maintaining public order—Everyone bound to assist—The suppression of riots—The use of arms—Reading the Riot Act—Calling out the military—Soldiers using arms are liable like civilians—The marine who shot the sailor—The right of self-defence—How far it extends—Must be proportionate to the attack—Arresting suspected criminals—Why best to leave it to the police, as a rule—The right of public meeting—Free speech—Sedition—The old notion—The police and the public—Public rights and private ownership—Rights of way—Rights of common—Rights of tenants of manors—Some good advice—More advice to country people.

**O**NE of the most important duties of the citizen is to assist in maintaining public order. In actual practice we are apt to leave this matter to the police, but every citizen is bound by his duty to the State to repress disorder and crime. The State undertakes, in return, to preserve the citizen in life, limb, and property. If called upon by a peace officer to assist in apprehending a prisoner, or in repressing a riot or breach of the peace, the able-bodied citizen must obey the call. If he refuses, he is liable to a fine.

In this place it will be interesting and useful to discuss the law on the suppression of riots. A riot is a gathering of disorderly persons who have the intent to commit, or are actually engaged in committing, a breach of the peace, or some offence against the law. And it is a crime to be a rioter. Moreover, it is the duty of all magistrates to suppress a riot, and for that purpose to call to their assistance all citizens who are on the side of law and order. I daresay most folk have heard of "reading the Riot Act," but they may not all know what that phrase really means. In the eighteenth century riots were of painful frequency. There was the famous case of Damaree, a lawless fellow who pretended, or perhaps actually felt, a violent dislike to Dissenters. Whereupon he gathered together a mob of blackguards as lawless as himself, and led them about London to pull down and destroy all Dissenting meeting-houses. Conding punishment was dealt out to this most religious supporter of the Establishment. Then there was Lord George Gordon, the mad fanatic who imagined that the Roman Catholics were about to make England a Papal fief. He also paraded the capital at the head of a troop of ruffians, burning, pillaging, and destroying. After the death of Queen Anne, also, frequent riots arose between the Hanoverians and the Jacobites, bringing about great loss of life, wounds, bruises, destruction of property, and public turmoil. For in those days you argued with your political opponents by breaking their heads or cutting their throats.

Now it is, and always was, the law of Great Britain that a riotous mob can be repelled and dispersed by force. The force to be used must be proportioned



to the character and violence of the mob, and, if need be, the magistrates and orderly citizens must "not hesitate," in the phrase used during a well-known incident, "to shoot."

But a very heavy responsibility lies upon the magistrates who lead the forces of law and order; for if they commanded their forces to shoot or cut down the rioters, they might be indicted for the murder of everyone slain, and convicted unless they could prove that killing was necessary to restore order. And so the famous "Riot Act" was passed in the year 1714, in consequence of Damaree's case. This statute declared that if twelve or more people assemble riotously (*i.e.* in a disorderly manner) in a public place, they constitute an unlawful assembly. Any magistrate may proceed to the spot and read to the mob a proclamation set forth in the Act, ordering them to disperse to their homes; and if they refuse to go, but remain assembled for one hour after the reading of the proclamation, they may be dispersed by force. And any person killing a rioter is absolved from guilt. It is not the Riot Act itself that is read, you observe.

It has been pointed out by eminent authorities, however, that the Riot Act does not take away the right and duty of all good citizens to assist in suppressing riots—and by force if need be. That is to say, if you and I see a mob engaged in assaulting a fellow-citizen, or in pulling down a chapel after the manner of the pious Damaree, we need not wait for a magistrate to come along and read the statutory proclamation. We can use our walking-sticks, our fists, and, if these will not avail, we can fetch out our shot guns, rifles, revolvers, Maxims, or other offensive weapons, and drive off the rioters. And if some of them are killed, so much the worse for them.

It is usual in these days, if a riot is proceeding, for the magistrates in the district to send to the nearest military barracks and ask the commander there to send some soldiers to the assistance of the civil authority. Such a request is generally complied with. When the soldiers arrive on the scene of the riot, it is usual for the magistrate first to "read the Riot Act"—that is, the proclamation contained in the Act—and then, if the rioters proceed to violence, or do not disperse within the hour, to order the soldiers to disperse the crowd. Remember what I said before, namely, that if a breach of the peace (vulgarly termed a row) is on the point of happening, or has already commenced, there is no real legal necessity to wait the statutory hour or even to read the proclamation at all. Suppose that the magistrate orders the mob to be fired on, and the military officer in command gives the word, and the troops fire a volley into the crowd, what is the legal position?

The legal position of the actors and sufferers in such a tragedy varies slightly according as the Riot Act proclamation has or has not been read, and the statutory hour has or has not been observed. In any case, if one of the persons fired at has been killed, the magistrate who ordered the firing, the officer who gave the word of command, and the soldier who fired the fatal bullet, may be put on their trial for murder. If the proclamation was read and the hour had elapsed, the accused will go scot-free if they can prove that the assembly which they fired on was composed of at least twelve

persons gathered together in a disorderly manner in a public place. If no proclamation was read, or if it was read but the hour had not elapsed, they will still go scot-free if they can prove that there was, in fact, a riot, and that the disorder could not be prevented or suppressed without extreme force. If they fail to prove these points, the jury ought to find them guilty of the capital offence.

It may be a surprise to many of my readers to learn that the common soldier, who only pulls the trigger in obedience to orders which he was bound by military law to obey, should be under any liability at all. But it is one of the peculiarities of the British Constitution that every man is liable for his own act, no matter at whose commands he did it—unless the order is given by a judge or person exercising judicial functions.

Many years ago there was a singular instance of this principle. A marine serving on one of the King's ships was put on sentry duty when the ship was lying at anchor in British waters. A sailor who had gone ashore on leave returned very drunk. So drunk was he that when challenged by the sentry he made no answer, but attempted to clamber up into the ship. Again he was challenged, and again made no reply. Then the sentry brought his musket to the "present," and challenged again. Receiving no answer, he fired with aim, alas! too true, for the unfortunate sailor dropped dead with a bullet through his heart. The civil authorities arrested the marine and put him on his trial for murder. It was admitted that he did no more than his military duty in firing at the sailor. But the judge held that in point of law this was no excuse; and the marine was found guilty and sentenced to death. It is pleasant to record, however, that the royal prerogative of mercy was extended to him, and he received a full pardon. The extraordinary part of the case is that, had the marine failed in his military duty, he would have been liable to be imprisoned, dismissed the service, or even shot or hanged from the yard-arm.

In the case of soldiers who fire on a crowd, it would be very difficult to convict the actual slayer, because it would be almost impossible to prove out of a whole troop who it was that fired the fatal bullet. And I should think that even if this almost insuperable difficulty of identification were surmounted, and the soldier were convicted, the royal pardon would be granted as a matter of course.

But what I wish to draw your attention to is this:—In the matter of suppressing a riot, a soldier is on exactly the same footing as a civilian; neither more nor less. True, soldiers are usually called upon to execute this dangerous and disagreeable duty. But it is not because they enjoy any special immunity from the consequences of their acts. It is simply because from their arms and their discipline they are the best able to perform it. Anyone who wishes to pursue the subject of this inquiry further will find it fully discussed in the report of the commissioners appointed to inquire into the Featherstone Riots—a case in which a party of soldiers fired on a crowd of miners on strike, with the not unusual result that one or two perfectly harmless people present, who were neither miners nor strikers nor disorderly, were killed.

The right of self-defence is by some old writers declared to be inherent



in all men by the law of nature. Now these "natural rights" are all very well, but they are not recognised by the law of Great Britain simply because they are natural rights. And I do not advise any of my readers to act upon any "natural right" that he may think he has. In this particular case, the "natural" and the civil law happen to agree; for it is the law that a man may defend himself, his wife, child, or servant, from physical aggression. He may also repel by force a forcible attack upon his property. Having stated these propositions broadly, I will proceed, after the manner of lawyers, to narrow them down to their safe and proper limits.

When you, or your wife, child, or servant is attacked, or threatened with violence in such a manner as reasonably to lead you to believe that violence is about to be used, you may resist the aggressor. And as the best mode of resistance is, very often, to attack, you may lawfully follow the advice given by an old prize-fighter to a pupil. The pupil had been taking boxing lessons, and one day he said to his instructor, "I think I shall be able to take care of myself in a row, now." "Right you are, sir," replied the pugilist; "but take my advice, and always get in with the first whack."

But self-defence must be moderate. It must not be totally disproportioned to the attack. For instance, if a hulking ruffian runs at me with a knife, I may shoot him. But if he runs at me merely with his fists clenched, and I shoot him dead with a revolver, I shall probably be hanged by the neck. I do not intend you to understand that the law expects a man to be calm and cool and collected in all circumstances. By no means. For instance, if the said burly ruffian rushes at me with clenched fists, evidently meaning mischief, and I hit him with a heavy stick on the back of the ear, I may kill him. But I shall not be hanged for that. I had a right to use the stick; and in the circumstances I am not to be supposed to be cool enough to aim for a spot not likely to be fatal.

Again, self-defence must not develop into revenge. Thus, if I am threatened with a knife, and by the timely display of a pistol I frighten my assailant so that he runs away, I must not shoot after him. If I do, I am just as liable as though he had never threatened me, because I shoot at him not in self-defence, but by way of punishment or revenge.

The discussion of this subject naturally leads me to discuss another—namely, **what right has a private citizen to arrest a suspected wrong-doer?** Let me say that, although a private citizen has a right up to a certain point to lay hands on a suspected person, the right is one that should be very carefully exercised. An English citizen may arrest anybody whom he finds committing a breach of the peace. He may also lay hands on a person whom he suspects of having committed a felony, provided that a felony has actually been committed. Thus, you are travelling in an omnibus, when a lady declares that her purse has just been stolen from her pocket, and accuses another passenger of having stolen it. Or perhaps you yourself have observed that passenger making suspicious movements. You may arrest the suspected person, and will be held exonerated even though he proves himself innocent, provided that the lady's purse was stolen by somebody.

I once came across a man who arrested a supposed pickpocket in circumstances like those I have described. The fellow struggled and tried to escape, but the law-and-order citizen wrestled with him, and finally overthrew him, and sat on him until the belated man in blue arrived. Then the virtuous citizen went home and told his wife, and she thought him a hero. After dinner he strolled down to the club and related the story to men in the smoke-room. And they applauded his promptitude and, when he had gone, turned to one another and said, "We shall not hear the last of this for months. Did you ever hear so much brag about a trifle?"

And the next day the virtuous one donned his best-fitting frock coat and went down to the police court, that he might record anew his exploit. The which he would have done, and with fluency, I doubt not, but that, on the case being called, the lady of the purse stepped into the witness-box and begged the prisoner's pardon for putting him to so much trouble. She had found the purse on the table when she returned home! She thought it was in her pocket in the 'bus; and when she felt for it and found it was not there, she thought it must have been stolen. She was very sorry, etc., etc.

The amateur thief-catcher went not to the club that night, nor, indeed, for many nights after that. He was occupied in wondering whether his solicitor would manage to get him cheaply out of the action that had been brought by the "thief" for assault and false imprisonment. He eventually escaped for about £250. You see, he had no defence to the action, because, although he had reasonable ground for believing that the "thief" had stolen a purse, yet, as a matter of fact, no purse had been stolen by anybody. If the purse had been stolen, and the captor had simply arrested the wrong man, he could not have been made liable for the damages.

**A police officer is in a better position.** For instance, in the case just recited a police officer would have been justified in making an arrest. For such an officer may make a capture if he reasonably believes that a felony has been committed, and that the prisoner is the culprit.

**The right of public meeting.**—The British people are very fond of contrasting their **liberty of speech** and of public meeting with the system of various Continental nations where the governments exercise the power of forbidding or breaking up meetings, or even of forbidding public criticism of the acts of the executive government. In truth, I suppose that by no people, with the possible exception of the Greeks, has the discussion of public questions in public places by private individuals been carried to such an extent as by the English-speaking races.

In view of this fact, it is curious to observe that there is no law on the statute-book which gives to the free-born Briton the right of public meeting and free speech. Legally, this right depends merely on the absence of any law prohibiting it. Any number of people are entitled to go to any place, so long as they do not trespass on private property or obstruct traffic, or behave in a disorderly manner. When they are at this place, any one of them or any number of them may say whatever he likes so long as he does not use profane or blasphemous language, or defame the character of his



neighbour, or talk sedition, or incite to crime. Any of these things he may not do, for they are crimes. And they are crimes none the more and none the less for that they are done in public. They would be just as criminal and no more criminal if they were committed in private. And the speaker, keeping within these limits, may speak conversationally, or in a whisper, or as loud as he likes.

Public men and governments of this day in the British Empire receive daily, and with equanimity, torrents of criticism and loads of abuse. In former times they were more thin-skinned, and those who spoke ill of persons in authority were apt to find themselves in the dock, accused of sedition. **Sedition** is inciting subjects to rebel—that is, to such disaffection against the Crown and its officers as would lead other subjects to attempt to overturn the Government by force. The judges of the Stuarts, the Tudors, and even of the post-Revolution sovereigns held rather strange views on this subject. In the words of the learned author of *The Student's Legal History*, "the offence was a vague one, and seems to have consisted of writing or publishing anything to the scandal of the Government—that is, written blame, *true or false*, concerning the king or his family, ministers, judges, magistrates, or officers." Thus, barrister Prynne had his ears cut off for writing against the morality of stage plays, because Queen Henrietta, who had produced a play at Court, was supposed to be aimed at. One Baxter was fined by the infamous Jeffreys for a passage in a book about "the persecution of the saints"—at that time the bishops were harrying the Dissenters. Poor Barnardiston wrote a letter to a friend, in which he said that "the Papists and high Tories are quite down in the mouth, and Sir George is grown very humble." "Sir George" was bully Jeffreys. The patriot Eliot was prosecuted for saying that the king and his counsellors had conspired together to trample under foot the liberty of the subject and the privileges of the House of Commons. As late as 1777 the Reverend Horne Tooke was tried for having written that the British troops engaged in the American War of Independence were murdering their brethren across the Atlantic.

One of the last great cases—and a very comical one it was—was the trial of two prisoners in the King's Bench prison in 1792. It was the time when men's minds were stirred by the stories of the French Revolution. The two prisoners aforesaid posted a placard on the wall of the gaol:—"This house to let. Peaceable possession will be given by the present tenants on or before the 1st day of January, 1793, being the commencement of the first year of liberty in Great Britain." Now, if this was worth noticing, surely it was only as a very mild joke. But Government took alarm. They thought of Danton and Robespierre, of Marie Antoinette, of the guillotine and the gallows-lamp-post. And so the two jokers were haled up at the Old Bailey and accused in set and solemn form "that they, wickedly and seditiously devising, contriving, and intending to excite and stir up divers prisoners to escape, did publish an infamous, wicked, and seditious libel." Imagine, if you can, such a prosecution in the year 1892! How the judge would have scoffed at the prosecuting counsel! How those same counsel would have laughed in the sleeves of their

gowns! How the jury would have roared with laughter—unless, indeed, they had been wroth at being taken away from business to try such a foolish matter! But it was otherwise in 1792. It was no joke then, as the prisoners found to their cost. For the intelligent City of London jury found them guilty of seditious libel, and the judge sentenced them to a long term of imprisonment. The question of whether a man is guilty of sedition is always a question for a jury, and juries are not now apt to adopt the view of the Lord Chief Justice Scroggs, who held that the publication of any news was seditious! In the reign of Edward I. a quaint statute enacted that “from henceforth none shall be so hardy to tell or publish any false news or tales, whereby discord or occasional discord or slander may grow between the king and his people or the great ones of the realm.” Try to imagine the desolation in Fleet Street if this Act were to be enforced to-day.

**Public and general rights.**—We frequently hear and read of conflicts between landowners and the public on the subject of public rights in relation to land. The rights commonly claimed are: that the public have the right to have a piece of land left open to them; that a particular piece of ground is common pasture land for the inhabitants of a town; that a certain wood or forest is free and open to the public. These rights come in question when the landlord to whom the land belongs tries to fence in or build upon a piece of land hitherto left as an open space.

Let me say at once that the public, as such, never have any rights in these matters. Not that the landlord necessarily has the right to close the open space; but that the general public have no right to prevent him. If anyone has the right to stop the landlord from making the enclosure, he must claim the **right by custom**. And custom, as I have told you in a previous part of this work, is a local matter. That is to say, there may be a custom of a village, a parish, a county, a manor; but not a public custom. So that if anyone has the right to interfere with a landowner who tries to enclose an open piece of ground, it must be some villager, parishioner, or tenant of the manor, who claims by virtue of a local custom.

**A valid custom** must be certain; it must be reasonable; it must be compulsory; it must be consistent with the ownership of the soil by the landlord; and it must date from time immemorial. I have explained the meaning of these terms on pages 326–330, more particularly with regard to the law of Contract; and I refer my readers to those pages. You will, perhaps, better see the kind of customs that have been held reasonable if I give you a few instances. The first is that relating to a custom that was contested in 1837. At that time there used to be held in the manor, lordship, or forest of Westward, in Cumberland, a fair. This fair had been held from time immemorial, being, in fact, one of those old markets at which country people were wont to sell their horses and other surplus stock. It began on Whit-Monday, and continued on alternate Mondays until the feast of All Souls. It had been customary for victuallers to set up refreshment booths on the fair ground; and as long as anybody could remember each victualler had paid the sum of twopence for the privilege. The year in question, Mr. Tyson, who owned the ground, refused



to allow one Smith, a victualler, to set up his customary stall. Smith brought an action to assert his right, and the right he claimed was this: That by an ancient and laudable custom in the manor every liege subject exercising the trade or calling of a victualler was entitled to enter the fair ground at a reasonable time before the first Monday of the fair, and erect booths there on payment of the customary twopence. It was proved beyond a doubt that for hundreds of years the alleged custom had prevailed, for Mr. Smith was able to bring forward testimony from old inhabitants of the manor to that effect. Then came a long legal argument as to whether the custom was reasonable. The landlord said it was unreasonable on two grounds: first, because twopence was an unreasonably small sum; and second, because if Mr. Smith's contention was correct, all the victuallers in the kingdom might come, and so there would be no room. But a full bench of judges decided that the custom was not unreasonable. As to the low charge, twopence was no doubt a very good rent in the old days when the fair first began. And as to the other point, it was idle to suppose that the victuallers would come in crowds; because anyone coming to the ground after the first few refreshment booths were erected would go away, simply because he would know that it would be no good to stop. Wherefore the ancient and laudable custom was upheld.

In a very old case, some Kentish fishermen were sued for trespass in having landed on private property for the purpose of drying their nets. They defended themselves by pleading that it was a custom of Kent that the men of Kent might dry their nets on any lands in the county, adjacent to the seashore. This custom also was held to be valid, notwithstanding the protests of the landowner. In that case, the bench said that although the occupier of the land might be put to inconvenience, his loss was more than counter-balanced by the great advantage to the fishing community, and through them to the country. It is always one test of reasonableness whether the gain to the public outweighs the disadvantage to the owner of the soil. For, of course, it is always a disadvantage to the owner of land not to be able to exclude from it the whole world. For instance, the owner of land in Kent adjacent to the sea would not be able to use the strip nearest to the water as corn-growing land.

On the same argument of the balance of convenience was decided another case illustrative of a very usual kind of custom. In early times, the greater part of the land in England was divided into manors, owned by great landlords. These landlords granted out portions of their estates to various classes of tenants. The better class of tenants, who were freemen, held their farms as freeholds, descendable from father to son, and were required to pay to the lord of the manor a small money rental and certain fines when the farm changed hands. In addition, heriots or heregilds were payable, generally when the lord died and his heirs succeeded him. The heriot varied on different manors; but it was usually either the best beast or the best chattel (*i.e.* movable article) on the farm at the time. Frequently the lord of the manor allowed the tenant to compound for the heriot by paying a sum of

money. A few months before these words were written, a very curious question arose in a manor of the Midlands of England. The lord of the manor was entitled to a heriot of the best beast or chattel of a certain tenant. The tenant had no beasts, and his best chattel was his suit of Sunday clothes, which he offered to the lord. The lord of the manor refused to accept the suit, and claimed money. Up to the time of writing, the case had not been decided.

Besides freehold tenants, the lord of the manor had copyhold tenants. These were originally serfs or villeins, who were bound to work for their lord—to tend his cattle and his swine, to plough his land and reap his harvest. They were not paid wages, but received a grant of a plot of arable land in the manor, just about big enough to enable them to grow corn, fruits, and vegetables for their own subsistence. As a rule, they were also allowed the privilege of pasturing a yoke of oxen or more on the waste land of the manor. Other privileges they had of the same nature—as, to gather firewood in the lord's woods, to cut timber for the repair of their houses, to turn so many pigs into the woods to feed, and so on. Gradually these privileges became rights; for the judges held that where it had become customary on a manor to allow the tenants to pasture their cattle on certain parts, the lord had no right to stop those tenants from continuing to enjoy this benefit. The lands on which the tenants of the manor exercised these common rights came to be called common land, because it was used in common by all the tenants of the manor and by the lord. And none of this common land could be enclosed or built upon without the consent of all the tenants of the manor as well as the lord. To this fact we owe the preservation of many large open spaces. Hampstead Heath, for instance, was the waste or common land of the manor of Hampstead. It did not, as you observe, belong to the public. The public, as such, had no rights over it whatever. It belonged to the lord of the manor, and the only reason why he could not enclose it for his own use was that, by the custom of the manor of Hampstead, the tenants of that manor had the right to put sheep and cattle there to feed.

There was a manor once, I know not where, the tenants of which had a customary right of pasture over a piece of common ground. The lord of the manor wanted the ground for his own cattle; so he pretended that there was a custom that no commoner should turn in his cattle until he (the lord) had turned in his. The judges refused to enforce this pretended custom. They said it was unreasonable, because it would make the many dependent on the convenience, or even the caprice, of one.

It appears that there cannot be a valid custom to enter upon the land of another and take something valuable from it. The reason of this is that as the customary right is always a right in favour of a considerable number of persons, if those persons were allowed to carry away something from the land, they would soon destroy the subject matter of the custom. No custom is reasonable which is destructive of the subject matter, and therefore no such custom is good in law. There was a case in 1855 in



which the inhabitants of a village claimed the right by custom to angle and fish in a certain river. The river was not a tidal river; had it been, the question would not have arisen, because as a rule everybody has a right to fish in a tidal river, for it is part of the sea. But this was a freshwater stream running through private land. After great discussion it was decided that the pretended custom was bad; because a general right to kill fish would soon leave no fish to be angled for. In other words, the alleged right was destructive of the subject matter, and therefore unreasonable and invalid.

An apparent but not real exception to this rule is a customary right to take water from a well or spring. A Mr. Race was owner of some land in a country part. This land contained a spring of water of great purity, and Mr. Race or one of the previous owners had made a well there. For years—so long that the memory of man ran not to the contrary—the inhabitants of the village had been accustomed to resort to this spring for their drinking-water, and they enjoyed this privilege without interruption till 1854. Then Race discovered that it was inconvenient and an annoyance to him to have people continually tramping backwards and forwards over his land, and forthwith proceeded to close up the pathway and to build a cover over the well, with a padlock, so that nobody could draw water without his leave. There was the usual parish indignation meeting, and a Mr. Ward was selected to bell the cat. This he did by walking with a bucket to the well, breaking open the covering, and drawing a bucketful of the crystal fluid. Race at once took up the challenge, and sent Mr. Ward a writ claiming damage for trespass. Ward replied that so far from being a trespasser, he had a perfect right to go where he had gone and do what he had done, for that by an ancient and laudable custom the inhabitants of the village—of whom he was one—had a right to take water from this well or spring.

It was proved by overwhelming evidence that this supposed right had been exercised from times beyond the memory of man. The oldest inhabitant, a patriarch of eighty-five winters, related that when he was a small boy he used to be sent by his mother to carry water from the spring, and that he had never been stopped or questioned. Also, that he had heard his father declare that everyone in the village had a right to use this well, and always had used it. Beaten on the facts, Race tried to win by arguing that the so-called custom could not be valid because it alleged a right to take something away from his land. But it would not do. The judges pointed out that although something was taken away from Mr. Race's land, yet the taking away in no sort diminished the amount that remained. As everybody knows, if you have a well fed by a stream, and you empty the well at this moment, in an hour or two at most there will be as much in the well as there was at first. So that the custom was not destructive of the subject matter, as in the fishing case, and therefore could not be unreasonable on that account. It was not as though the water had been in a cistern and required replenishing by the

hand of man. If such had been the case, there could not have been a good custom to carry the water away. But Nature had provided Mr. Race's well with a constant supply without any extra cost to Mr. Race. Wherein old Dame Nature showed herself more generous and more kindly than some modern water companies I have heard of.

There are some cases in the old Law Reports with respect to customs entitling the inhabitants of various places **to use land for purposes of recreation and sport**. The most curious of these, perhaps, is an old case tried at the Oxford Assizes in the seventeenth year of the reign of Charles II. A Mr. Abbott had a field which was his freehold, and the inhabitants had been accustomed to use this field for a recreation ground. The festive Oxonians were dancing in the field one day, when Mr. Abbott appeared on the scene and ordered them off. As they refused to go, he brought an action of trespass against one of the ringleaders, whose name was Weekly. As the Report hath it, the defendant replies "that all the Inhabitants of the Village, time out of Memory, had used to dance there at all times of the Year, for their Recreation, and so justifies to dance there." Abbott argued "that to dance in the freehold of another, and spoil his grass, was void." Moreover, said he, though inhabitants could doubtless prescribe for easements, "Yet they ought to be Easements of Necessity, as ways to a Church, and not for pleasure only, as this Case is." The Report continues: "But by the Court: 'This is a Good Custom, and it is necessary for the Inhabitants to have their Recreation.'"

In more modern times, the inhabitants of Ashford Carbonnell, in Shropshire, successfully upheld a claim to enter upon a field called Maypole Piece, in that village, to erect a maypole there, and "dance round and about the same, and otherwise enjoy any lawful and innocent recreation, at any time in the year." The field in question was enclosed—not an open space—and was part of the parson's glebe, so that in this respect it differed from most cases of the kind. The parson pleaded that if the inhabitants had the right claimed by them, it would practically render his field worthless to him; but the Court of Exchequer held that the custom was a good one, on the authority of the old Oxford case above quoted.

It should be said that a general claim "to enter upon a piece of land and play at rural sports and games at all times, at the will and pleasure of the inhabitants," is not a valid claim. It should be limited to "all reasonable times," or "all seasonable times." In an old case in the year 1740, a dispute arose as to an alleged customary right exercised over two fields called "Shieldfield" and "Little Shieldfield," situate at Newcastle-on-Tyne, and belonging to Thomas Bell. Bell had planted these fields with corn, when two gentlemen named Wardell and Cummin rode in, and proceeded to gallop their horses up and down. As the Report puts it, they "with their feet trod down, spoiled and consumed the plaintiff's grass and corn there growing, and with divers cattle trod down, depastured, ate up, and consumed other grass and corn of the plaintiff's there growing, and broke down and spoiled five perches of his hedges and five perches of his fences, and other wrongs there did, to the damage of £20."



The defendants alleged that for time out of memory these two fields had been open spaces, and that there had been an ancient custom in the town of Newcastle for the inhabitants, "at all seasonable times in the year," to walk and ride on horseback on the land in question, "for air and exercise for the benefit and preservation of the health of the inhabitants of the said town." To this Mr. Bell very fairly rejoined that, on their own showing, the defendants had done wrong; and the judges agreed with Mr. Bell. Their lordships said that here was a case of arable land, and between the 2nd and 12th of May, when the corn was on it, the defendants had ridden over the land on horseback. Clearly, their lordships said, this cannot be a seasonable time. A seasonable time would be when there was no corn on the land. It would have been vastly different had this been pasture; but it wasn't. I ought to add that in a later case an eminent judge, Baron Martin, expressed a cautious opinion that the fact of the land being arable ought not to have been considered; because, the custom dating from before legal memory, the land might have been pasture when the custom began (Richard I.). Still, Wardell and Cummin limited their claim to "seasonable" times, and so could not complain.

The next custom to which I desire to call your attention shows the antiquity of the game of cricket. At Steeple Bumpstead, in Essex, there was, in the year 1794, a pleasant mead, with close turf, level—in short, a most desirable cricket pitch. Thither the young men of Steeple Bumpstead did resort in the summer and pitch their wickets. There were only two stumps in those days; and the bowling was all underhand, and no one had ever been known to score a "century." There was no county championship, and no gate money; but doubtless the maidens of Steeple Bumpstead formed an appreciative ring, and the old gaffers looked on and shook their heads, and allowed that young Chatteris was a good player, but you should have seen his uncle Sam. The Steeple Bumpstead C.C. contained some celebrated players; and at last it was decided to challenge to a match the eleven of a neighbouring village. The challenge was accepted; and one fine summer morning the Steeple Bumpsteadians and their rivals met on the Steeple Bumpstead ground to try conclusions. The match was in progress; and Chatteris, the best bat of Steeple Bumpstead, had just made one of his celebrated leg mows, when there appeared on the scene Farmer Fitch. A cross-grained old buffer was Fitch. He cared not for cricket; neither was the honour of Steeple Bumpstead dear to him. And, unfortunately, the field was Farmer Fitch's property.

Greatly daring, the farmer walked up to the wicket, and ordered the two elevens to stop. I leave you to judge whether they did or not. Chatteris, in particular, who was just getting set, told the bowler to play up, and never mind the old curmudgeon. And so the match was fought to a finish; and I hope the better team won. But Farmer Fitch had not by any means finished. He sued the gallant Chatteris, the crack of Steeple Bumpstead, and two members of the visiting eleven, for trespassing on his field, and "with divers other persons, playing at a game called cricket." This shows you

what kind of man was Farmer Fitch. "*A game called cricket!*" Who ever heard of such a thing!

The three cricketers defended the action. Chatteris averred that by an ancient and laudable custom all the inhabitants of Steeple Bumpstead had, from time immemorial, and ought of right to have, the liberty of playing at all lawful games at all seasonable times of the year in the said field. The two visitors could not say this, because they were not inhabitants of Steeple Bumpstead, so they set up an ancient custom in favour of "all persons for the time being, being in the said parish." This was artful; but not convincing. As one of the judges remarked, that meant everybody and anybody. Now customs must in their nature be confined to particular persons. Wherefore the two visitors lost their case. But Chatteris won his. I know not whether the Steeple Bumpstead C.C. acquired another ground. If not, no more could they display their prowess against the neighbouring villages. They could play "*Over Thirty v. Under Thirty*," "*Married v. Single*," and so on; but there would be little satisfaction in that.

In 1863 the freemen of Carlisle contested a case and preserved a customary right. Near the city of Carlisle is a hamlet called Kingsmoor, where for hundreds of years it had been customary for the freemen of Carlisle to hold horse races every Ascension Day. In 1862, part of the land over which the races were run came into possession of Mr. Mounsey. He did not approve of horse racing; and so he erected fences, posts and rails, and made a bank whereon he planted thorns—in fact, he fenced his land in a thoroughly substantial fashion. On Ascension Day, the freemen found their sport interfered with by these obstacles; and, headed by a Mr. Ismay, they proceeded to pull down the fence, pull up the thorns, and level the bank. Mounsey at once took action for trespass against Ismay; and Ismay defended himself by setting up the ancient and laudable custom that had existed from time immemorial in the hamlet of Kingsmoor and the city of Carlisle to hold races on the moor once a year.

The stalwart freemen were able to prove by ancient records that these races had been held from time immemorial. They also proved that the fences, thorns and bank would have prevented them from holding their sport. The judges had no doubt about it. They exonerated Ismay and his friends from all blame, and decided that the custom was a good one.

The cases that I have cited so far have been English cases; but the law of Scotland stands on the same footing as the law of England in respect of these public rights. The question of whether there is a public right to use a way or a field, or golf links, depends on the theory of dedication to the public use, and on custom.

**Public rights of road.**—Much misapprehension exists on the subject of public rights of way. A private right of way can be given by a deed expressly granting the same or may be acquired by long enjoyment. When you, who occupy the Holme Farm, have been accustomed for twenty years to use a footpath over the farm of your neighbour, you acquire a prescriptive right of way.



But a public way is a very different matter. It cannot be acquired simply by length of enjoyment. Let me tell you why. If you are in the habit of using a footpath leading from your premises over Farmer Giles's field, the presumption is that Farmer Giles would stop you if you had no right there. And if you go on using it for twenty years, the law presumes that at some time or other Farmer Giles duly granted you the right of way. True, you cannot produce any deed showing any such grant; but the law presumes that there was such a deed, but that it has been lost. This presumption is made by the English law as a protection to people who might otherwise be disturbed for want of the documents which prove their rights. On the same principle, a debt cannot be sued upon after the lapse of six years unless the debtor has in the meantime paid something on account or signed an acknowledgment of his indebtedness, in which case the six years will run from the part-payment or acknowledgment. The idea is that in course of time documents perish or are lost.

Now, in the case of a right of way claimed by the public, these reasons do not exist. For, in the first place, a public right of way is not created by any document; so that there is no need for a legal presumption of a lost deed. A public right of way, or, to speak more properly, a public road or highway, is created by the owner of the land **dedicating the soil to the public**. Once this is done, it is as effectual to give the public a right of road as a hundred years' use of it. On the contrary, unless this is done, no matter how long the path has been used, it is not a public path.

I do not mean to say that if you are fighting a landowner on a public right of way question that evidence of long and continuous use of the path is of no value. On the contrary, such evidence is of the very highest importance; and I advise you to gather together all the oldest inhabitants of the neighbourhood to say, if they truthfully can, that ever since they have known the place the pathway has been in existence and has been used by the public without let or hindrance. And they can go farther than this. They will be allowed to say in Court what they themselves have been told by other old inhabitants who are dead. This kind of evidence is called "hearsay," and is usually not allowed in courts of law. But hearsay is admitted in questions of public rights; though, of course, it is not quite so valuable as testimony which is not hearsay.

I would add that when once a road or path has been dedicated to the public, it can never be closed except by an order made judicially. And when a tribunal is asked to close a public way it will always insist on another way, equally convenient to the public, being made. Moreover, if the road be in a rural parish, the consent of the District Council must be obtained.

You see, therefore, that **the important question** in all public right of way cases is, "Was this road ever dedicated to the public?" The answer to this question is usually a matter of no little difficulty; and I wish to inform you here **what dedication is**. Dedication, from a Latin word meaning "to give," signifies a giving up to; and when we speak of "dedicating a road to

the public," we mean that the owner of the soil gives to the public the right to use that road. The dedication may be of a footway, or a carriage way, or a road to drive beasts along, or a way for all purposes. It consists of three things, namely :—(1) Throwing the road open to the public; (2) the intention by the owner of the soil to dedicate the way to the public; and (3) the acceptance by the public of the gift. There can be no dedication without the intention to dedicate; and the public in claiming a right of road must be prepared to prove beyond doubt that some owner of the soil at some time or other had this intention.

How are you to prove such an intention as this? "The thought of man," as an old judge once said, "is not triable." That is to say, you never can really get at a man's thoughts, nor discover his intentions. You can only look at his acts and his conduct, and applying to them tests of reason and experience, draw conclusions as to his intention from them. You reason back from the overt act to the mental state, and there are classes of acts and courses of conduct from which an intention to dedicate a road to the public may and will be inferred. Most usually, the fact that the road has been used by the public without let or hindrance for a considerable period of time is evidence of an intention on the part of the owner of the soil to give the public a right to use the way. It is only evidence. It is not conclusive. But it is fairly strong when the public have used the road continuously and in large numbers for a considerable time. The reason why a dedication to the public may be presumed from the fact of public use, is that experience teaches us that a land-owner would not be likely to allow the public to get into the habit of using his road unless he intended them to have the right to continue to use it.

But, as I have said, mere public use—be it for ever so long a period—is not conclusive evidence of the owner's intention to confer a right of way on the public. For instance, if I find a road running through Hilltop Manor, and that road in constant use by the public, I might come to the conclusion that it was a public highway; but if I find a notice at one end of the road: "Tramps and vagrants found within this road will be dealt with according to law," or "Persons with dogs are not allowed on this road," I should modify my first opinion and conclude that the owner of the soil never had any intention of making the road public. In fact, such persons as were allowed to use the road would only be there on sufferance and not as of right.

Where a road is apparently thrown open to the public, and is used extensively by the public, a very short time will be sufficient to establish strong evidence of dedication. The difficult cases arise when the way is a country footpath only in use very occasionally. You can easily see why this is so. Obviously the use of a path by an average of (say) 200 persons a day for a month is a more emphatic assertion of a public right than the use of the same path by a few wayfarers amounting to (say) half-a-dozen in a week, though this intermittent and infrequent use went on for twenty years. You know that if you had an estate and you saw



numbers of people beginning to use a certain pathway as a short cut, you would be likely to stop them before the practice had gone on very long. On the other hand, if you saw an occasional traveller taking the short cut an odd time or two you would not be very likely to interfere.

On a like principle, one single act of interruption by the proprietor is far stronger evidence of his intention not to dedicate than a considerable number of acts of use by the public on the other side. It is all very well for half-a-dozen men to come forward and say that on such and such days they used the path in question and were not stopped. The proprietor may well say: "I did not stop you because I did not see you. If I had seen you I should certainly have ordered you off. The only people I ever saw making use of this path were two men named Jones and Smith, and I turned them back at once." It is difficult to say, in the face of this, that the proprietor had an intention to dedicate that path to the public.

Again, the proprietor may adopt the plan in vogue for so many years on the Duke of Bedford's Bloomsbury Estate. It is almost ancient history now; yet many Londoners will remember how the squares on the Bedford Estate were furnished with gates that could be closed at will, and all these gates bore a notification that the square was only to be used by the tenants and persons going to and coming from the houses in the square. The erection of a post or gate at the entrance of a way is conclusive evidence to prove that the proprietor had no intention to make that way a highway for the public.

Besides acts of use by the public, intention to dedicate may be shown in other ways. A declaration in writing, or even by word of mouth is sufficient. For from what are you to gather a man's intentions, if not by his written and spoken words?

It must be distinctly understood, however, that a mere intention to dedicate a way to the public is not sufficient to make a highway. For instance, suppose the Duke of Bedford had written to the London County Council declaring his intention of opening all the squares in Bloomsbury, but had still kept up his gates and posts, and locked his gates every night, you would have had an equivocal declaration of intention, but no performance. In order to complete the dedication on his part, it was necessary for the Duke to do what he in fact did—that is, to remove his gates and posts, so that anybody and everybody could walk, ride, or drive through the squares.

More than this, the public right is not complete until the public have used the road offered to them. The case is analogous to that of a contract. If I make you an offer, saying that I am willing to sell you a ton of coal for twenty shillings, there is no legal obligation upon me until you have declared your assent to the proposition. So in the case of a public highway. There are two sides to the transaction of dedication—the proprietor on the one hand, and the public on the other; and there is no complete turning of the private road into a public one until the public have accepted the gift by taking advantage of it.

The popular mind rarely draws the proper distinction between the acquisition of a public right of way and a private right of way. They are, in truth, wholly different. One proprietor acquires a right of way over the land of a neighbouring proprietor either by a deed of grant, or by twenty years' use and enjoyment. The public may acquire a highway by much less than a twenty years' use and enjoyment. Eight years' use was held enough in one instance. The difference between the two cases is, that while twenty years of using the road gives a right to use it to the neighbouring proprietor, any number of years of user, merely by itself, does not create a public right. It is only evidence that the owner of the road, whoever he might be, intended to give the right to the public. And the evidence is strong or weak rather as the public usage was much or little, than long or short.

It is not possible for a public right of way to exist, unless the way leads from one public place to another. For instance, if I have a house a long way from a high road and I make a path to it through my fields or park, that path can never become a public road. The reason is, that the terminus is my house, which is not a public place. At the same time, it is not necessary that a public road should be a thoroughfare. That is, it may lead to a *cul de sac*. To take an instance, there might be a public right of way from Fleet Street to Ely Place, though Ely Place itself leads nowhither. It is one of those streets described by a certain Irishman as a street with only one end. Again, there may be a public right of way from a town or village to the sea beach, provided that the beach itself is a place on which the public have a right to be. But there cannot be a public right of promenading up and down a path or road. For instance, suppose you own a house in the middle of a large park, and in the park is a footpath, well shaded by trees, leading to a pretty brook. There the path ends. You may have allowed the public to use that path as a walk for years, without let or hindrance. But you can close it at any time; and nobody can compel you to reopen it.

The point is, that in the case just alluded to, the path was only used as a promenade; and not as a road to anywhere. A public right of road cannot be claimed unless it can be alleged that the road is from such a place to such a place. The terminus of the road need not be a place resorted to for business purposes; that is to say, it need not be on the road to market or anything of that sort. For example, the public might have a right of way to a cricket field or to links where they play, as the old Scottish lawyers used to plead, "the game or play of golf or putt." In fact, I believe there was a case many years ago in which the public were declared to have a right of way to some golf links at or near Burntisland.

For fear of any misapprehension, let me say that public roads are not all created by dedication in the way described in the preceding paragraphs. Some of them are created by virtue of statutes passed in that behalf. And in rural parishes, District Councils have the right to purchase out of the public funds any rights of way that they may think it desirable to acquire on behalf of the public.



It is quite possible for a public right of way to exist for one purpose and not for another. For instance, a towing path by the side of a river may be a public right of way for such members of the public as desire to use it for the purpose of towing boats. To put it another way, the owner of the soil may dedicate it to the public as a towing path, and as a towing path only. So that it is not always safe to conclude that an unlimited right of way exists simply because a road or path has been used for a long time by the public for a particular purpose.

When the owner of land dedicates a part of it to the public as a road, he still remains the owner of the soil. That is to say, the soil of the road is his, just as it was before any road existed. The only change is that he cannot exclude the public from using the way in the accustomed manner. The public have only the right, whatever it may be, given to them by the dedication. And it may happen, in country places, that the owner of the soil has reserved to himself some right which interferes with the full enjoyment of the way by the public. Such a case was the one in which the owner of certain fields had been accustomed to allow the public to use a footpath as of right ; but in the springtime, when the fields were ploughed, he used to plough up path and all. A member of the public objected, and a lawsuit ensued ; but the courts had no doubt, from the long practice that had prevailed, that the original owner of the fields who had dedicated the way to the public, had reserved to himself the right to plough it up at ploughing-time.

It may surprise some of my readers to hear that when a man owns a house abutting on a high road, he is presumed to own the road itself up to the middle of it. So that if from any cause the road should be closed, he can move his fence to the middle of the old road, and so add to his 'available garden space. You see, the ground never ceased to be his, though, having once dedicated it to the public, he might not enclose it. In exactly the same way, the persons who own the land on the banks of a river own the soil of the river. An imaginary line is drawn down the middle of the stream, and the owner of the left bank owns the river bed on his side of the line, while the proprietor of the right bank owns the bed on his side. Neither of them owns the water, because running water cannot, in law, be the private property of anybody, any more than air can. But it is by virtue of the ownership of the bed of the stream that riparian owners can "preserve" their fisheries by forbidding members of the public fishing from boats.

**The obstruction of a public road or right of way** is an offence for which the obstructor is liable to be prosecuted criminally and fined. He may also be proceeded against in the civil courts for an injunction or inhibition to restrain him from continuing to obstruct. One is sometimes consulted about matters of this sort : There is a narrow street with shops on each side of it. Mr. Dash, the draper, takes it into his head to improve his premises. So he calls in a builder and orders him to put in a new shop-front, and to add another storey to the building. The builder erects scaffolding ; he dumps down loads of bricks in the narrow street ; and mixes mortar there also. In fact, he contrives to block up about half the width of the

thoroughfare. All this is to the intense annoyance of Bones, the butcher, opposite. The knight of the cleaver receives complaints from his customers. Mrs. De Jinks declares that she can no longer come to the shop while so much dirt and confusion reign in the street. And Mrs. De Jinks is an old and valuable customer of Bones, the butcher aforesaid. Wherefore Bones complains to his neighbour Dash, and asks for the road to be cleared. Dash declares this to be impossible at present, and Bones comes to consult me. He wants to know whether Dash can be compelled to remove the bricks and the heaps of mortar from the middle of the road. I am obliged to advise him that he has no case.

As I have told you already, the street, up to the middle of it, belongs to Dash. And Dash is entitled to make any reasonable use of his half so long as he does not, for an unreasonable time, or to an unreasonable extent, deprive the public of their right to pass and repass along the street. No reasonable man would venture to call it unreasonable for Dash to obstruct the road somewhat, in order to repair or rebuild his shop. Every case of this kind must depend on its own facts; but the partial obstruction of the road by Dash would have to last a long time before any judge would interfere. It would be quite another thing if the road were being obstructed so that no vehicle could pass, or merely on account of Dash's caprice or fancy, and to serve no useful object.

Once a road or path has become public by dedication, no length of time can legalise a nuisance or obstruction on that road. As to what is a nuisance, each case depends on its own facts. A nuisance to a highway may be described as an improper use of the road, whereby it is withdrawn, wholly or partly, from public use. In one case, in 1874, Messrs. Storr & Co., auctioneers, of Covent Garden, did a very large business, and vans were continually standing in Rose Street, at the back entrance of their premises, to load and unload. Rose Street was only eight feet wide, as far as the carriage way was concerned, and the vans coming to load and unload at Storr & Co.'s warehouse took up practically the whole of the roadway from eight in the morning to seven or eight at night. The obstruction so caused seriously affected the business of Mr. Benjamin, a coffee-house keeper, in Rose Street; and that gentleman took action against Storr & Co. The defenders replied that they only used the street in the way described for the necessary purposes of their business, and no more. But the Court of Common Pleas enjoined Messrs. Storr not to continue such a use of the street, which was, in fact, turning it into a stable yard. When you complain of obstruction to a right of way, you must be prepared to prove a real, substantial obstruction, not a nuisance of a fleeting or evanescent character.

The **right of navigating streams** is neither more nor less than a public right of way; and rests on entirely the same grounds as a right of way by land: I refer here only to inland waters and rivers above tide water. The tidal waters—*e.g.* Bristol Channel—are considered part of the sea, and are open to all and sundry; and tidal rivers are included in the same category, as far as tide water extends. But beyond this, inland waters and streams are presumed to belong



to the owners of the banks thereof. The public may acquire the right of navigation by dedication; and this dedication may be proved by showing long, uninterrupted, and peaceful use by the public. The use must be as of right. That is, it will not do to prove that for many, many years it has been usual for the owner of the stream to give permission to anybody who asked for it to navigate the river. You must prove that the public have used it as though they had a right to—whenever and however they pleased. When the public have acquired the right of passage along the stream, they have only acquired the right to navigate in a free manner. They cannot prevent the owner of the stream from doing what he likes in the stream so long as he leaves room for free passage of boats in the accustomed manner. Thus Messrs. Orr, Ewing & Co. were held entitled to throw a bridge across the River Leven, the bridge being supported by large piers resting in the bed of the river. Some members of the public tried to stop them, but the judges held that the public had no ground of complaint so long as the navigation, or right of water way, was not seriously obstructed by the piers. And the Lords of Appeal held that no serious obstruction had been proved.

**Blackmail.**—There is one little matter about which I wish to say a word or two, and that is the **police and the public**. It may fall to the lot of any man to be the victim of a mistake by the police, or to be the victim of a mistaken or **trumped-up accusation**. Most lawyers who practise or have practised in the criminal courts could tell you a tale or two on the trumped-up accusation question. There is nothing in the world more easy than for a woman to make a charge of misconduct against a man, and there is nothing more difficult than for a man to disprove or dispose of it. And there is a class of women fully aware of this fact. A woman of this kind will get into a railway carriage with a man, or accost him in a dark and lonely spot, and will there demand money with threats. She threatens that if the money be not forthcoming she will cry out and make an accusation of assault against her victim. Too often she succeeds, and the man pays rather than even be accused of such a crime. Now, the proper way to treat this kind of extortioner is **not to pay, but to call for the police**.

I once appeared in a case of the kind—a railway carriage case. The prosecutor, a Mr. Blank, was threatened with an accusation of the usual kind by a woman who jumped into the carriage just as the train was leaving the platform. Mr. Blank, fortunately, knew what to do. He said: "Madam, as soon as the train stops I shall give you into custody for attempting to extort money by threats!" And he was as good as his word. When the case came on for trial the woman was convicted without much difficulty. The police had hunted up her history in the meantime. I have no hesitation in saying that had the woman given Blank into custody on a false charge of assault, it would have been exceedingly difficult to defend Blank successfully. In each case, whichever is the prosecutor, the jury have to choose between the two. The judge says to

the jury: "Gentlemen, do you believe the evidence of the prosecutor?" And that is the whole question.

Now, juries generally prefer the word of the prosecutor as against that of the prisoner. Why they should, I know not; it is exceedingly unfair. But the fact is that they do. I suppose the mere fact that the one is in the dock, behind an iron bar, with a warder or two on each side, while the other is not, makes a difference. - And then, again, the jury are apt to say, *apropos* of the prisoner's protestations of innocence, "Well, after all, we can't expect him to say anything else. He is lying for his liberty."

Another reason why it is better to be the accuser than the accused in a case of this kind is that if a woman threatens to charge you with assault, and you don't give her into custody, your conduct is not quite so proper as if you had given her into custody. For it was your plain duty to do so.

This kind of blackmail is by no means the only kind in use. There is the man who threatens to kill you unless you give him money. There is the man who threatens to reveal to your friends, or to the police, some alleged misconduct of a gross character unless you buy him off. There is the breach of promise blackmail. There is the blackmail of the man or the woman who threatens to tell your wife or your *fiancée* that your life has not been chaste. There is the man who discovers some former act of yours that was not altogether honest and straightforward, and this he says he will reveal at the moment you have put up for some public office.

I repeat that the **only course to adopt** is to put the matter into the hands of a smart solicitor, with instructions to rid you of the blackmailer by sending him to gaol. It matters not one iota whether you have or have not been guilty of the crime or misconduct that serves the scoundrel for a handle. Once you start to bribe him to silence, your purse and fortune are his. He will bleed you without mercy and without remorse. Let the police deal with the gentleman. He will not be allowed, on his trial, to call evidence to prove that you really did that which he says you did. That will not be the question. The only question will be whether he has tried to extort money from you by threats.

There are, in London alone, scores of men and women who live by blackmail. Equally, there are scores of victims. Occasionally a man is found courageous enough to come forward and prosecute; but many are deterred by the sheer terror of being publicly accused of a horrible offence. I think the fright is wearing off to some extent. If people knew the law it would wear off altogether. The blackmailers generally mark down their man with a great deal of astuteness. They select a person who is of a nervous, timorous disposition, and generally of ample means. And they deem it the better business if he is a man in a public position—a Member of Parliament, a Town Councillor, an Elder of the Kirk, and so on. And, sad to relate, they not infrequently drive a victim into such a state of despair that he puts an end to his life. Not a few mysterious suicides might be traced to this cause.

Different from the blackmailing accusation, and more difficult to deal with,



is a *bonâ fide* but mistaken charge made by a respectable person—a policeman, for example. Let me say at once, that a good citizen, who is arrested by a policeman, should never resist; and an innocent man charged with a crime should always advance boldly to meet the accusation. Panic sometimes seizes upon the mind of a perfectly innocent man who is accused of a crime, and he runs away. Or perhaps he resists arrest; or, even worse, on the spur of the moment, he tries to escape further unpleasantness by a false tale.

Now, the explanation given by a prisoner on his arrest is almost always put down in writing by the constable who arrests him, and is used in evidence at the trial. The best thing that a prisoner can do is to content himself with saying, "I am innocent," and then holding his tongue until he reaches the police station. If, and only if, he is then in a calm state of mind, he can make a statement to the inspector in charge, and demand that it shall be read over to him. Experience tells me that not a few innocent men are convicted by reason of opening their mouths too widely to the arresting constable. Silence is golden in these cases.

In India, by the Indian Evidence Code drawn up by Sir James Fitzjames Stephen, a statement made by a prisoner or accused person to a policeman cannot be used in evidence against the accused. In the United Kingdom it can, provided it be voluntary. But a policeman who asks questions, or even says, "You had better speak the truth," exceeds his duty. For my own part, I think the Indian rule the safer. Policemen are so apt to regard it as a point of honour and professional reputation to secure the conviction of everybody whom they arrest, that they unconsciously exaggerate, or give a twist to the most harmless words.

Whilst I am on the subject of the police, I should like to add that a policeman making an arrest has **no right to use more force than is necessary**. The police in Great Britain do not use the vigorous methods of the New York custodians of the peace. These gentlemen use a heavy club on the slightest provocation, and in a manner that would not be tolerated in London for ten minutes. Still, the British policeman, and particularly the London policeman, loses his temper occasionally—and small blame to him. If a policeman, in "moving you on," or arresting you for some real or alleged offence, should treat you with unnecessary violence, your best plan is to take the names and addresses of some respectable-looking bystanders, so as to be able to summon them as witnesses. Or ask one or two of them to walk with you to the police station, and give their names and addresses to the inspector in charge.

**Gas.**—I have been asked to advise my readers as to their rights with reference to the gas companies. I regret to be unable to do this fully, as each gas company has its own private Act of Parliament; and all the statutes differ somewhat. There is, however, one matter—namely, that of **testing the meter**—in which the law is the same everywhere. Every local authority is bound to provide facilities for testing the meters supplied by gas companies to their customers. If you think that your meter has been registering falsely, you are entitled to have it tested by the Town or County Council expert. If

his report does not satisfy you—and he is not infallible—you may take out a summons before the magistrate, and ask him to decide the dispute between the Company and yourself. You should not embark in this proceeding without collecting fairly complete evidence. Thus, you will easily be able to show that the consumption as registered by the meter is (say) twice as large as in the same quarter of the previous year. But you must go farther than that. You must be able to prove that the actual consumption was the same, or about the same, as that of the corresponding quarter. I mention this power of appeal to the magistrates because many persons think that once the meter has been tested by the official inspector, his certificate is conclusive. That is not so.

**Advice to my country readers.**—During the course of this work I have received a request to give a word or two of advice to people who live in country places, far from lawyers' offices and from the business-like methods of city folk. I gladly do this, because I have known complications innumerable arise from want of knowledge of the little matters I am now about to tell.

Take the case, for instance, of a yeoman farmer in a secluded spot in Cornwall. We will call him Farmer Trepén. Trepén's farm marches with that of Farmer Polgar, who has often thought that if he could only buy Five Acre Piece, one of Trepén's fields, his (Polgar's) farm would be much more complete and more symmetrical. Wherefore Polgar, meeting neighbour Trepén one morning, opens negotiations, and asks him if he would be willing to sell Five Acre Piece; and if so, for how much? It happens that Trepén is in want of a little ready cash; and, moreover, his farm is big enough for him to handle without the field in question; and in a short time a bargain is struck. Trepén agrees to sell, and Polgar to buy, Five Acre Piece at the price of £500.

Now here comes the point of my warning and advice. As likely as not, the two neighbours will go about the business just as though they were buying and selling a horse or a cow. That is to say, Polgar will pay the £500 and take a receipt for it, and will then proceed to take possession of the field. And that is all. Or, perhaps, they may have a hazy sort of idea that a word or two of writing might be well as a record; and so they hie them to the village schoolmaster, and ask him to draw up a piece of paper to show that Trepén has sold and made over Five Acre Piece to Polgar, and has received the money for it. And perhaps the schoolmaster draws up such a paper, to be signed by the buyer and the seller.

Little do these gentlemen know the trouble they are laying up for themselves or their successors. The writing is of no good whatever except as an agreement to sell and transfer the land. The actual transfer must be done by a deed sealed with the seal of Trepén, the seller, and delivered to Polgar. This deed need not be drawn up by a lawyer; that is, if anybody else knows how to do it, and does it, the deed will be as valid as though it had been drawn up by a solicitor. But unless there is a deed by which Trepén conveys the field to Polgar in due form, Polgar does not become



the legal owner of the field. And deeds of this kind require a special certain skill and knowledge in the drawing thereof. The preparation of such documents forms part of a lawyer's education and training—the most difficult part. I myself have never met a layman who could draw up a deed of conveyance of land in such a form that it would be certain to hold water. It is, therefore, extremely foolish, and is no saving in the end, for persons to omit to employ the services of a solicitor in transactions relating to the purchase of land.

In the instance just given, a solicitor would draw a proper conveyance for £7 10s. He would not be allowed to charge more; because his fees for this kind of work are limited by Act of Parliament to the following scale:—

For deducing title to the property and completing the conveyance.—

When the purchase money does not exceed £1,000	the charge is	£1 10s. per cent.	
For the second and third £1,000	...	...	£1
For the fourth and every £1,000 up to £10,000	...	...	10s.
After £10,000	...	...	5s.

Thus, if the purchase money is £500 the solicitor's utmost remuneration will be £7 10s. If it is £1,200 his charge will be £17. If the vendor and the purchaser employ a solicitor each, each solicitor is entitled to charge the remuneration stated above to his own client. But there is no actual necessity in most cases to employ two solicitors. Both parties can employ the same gentleman; and he is then entitled to charge once and a half as much as though he acted for one of them only. Thus, in the case of a sale for £500, if both Trepen and Polgar ask Mr. Redtaip of Truro to do the business for them, he can only charge £7 10s. + £3 15s. = £11 5s.; of which each client will pay half = £5 12s. 6d.; so that it will be cheaper for both of them. In addition, there will be the stamp duty payable to Government amounting to £2 10s. This will have to be paid by Polgar the purchaser.

By the Land Transfer Act, 1897, a scheme was floated for the transfer of land by registering the transfer in a registry office to be established by the Government. Up to the time of writing no scale of fees has been drawn up. Some scale will be drawn up which will include fees to the registrar and a maximum scale of lawyers' charges. It is extremely likely that these charges will be less than those at present in vogue. In any county to which this Act is applied, transfers of land in the old way—that is, by deed—will be forbidden; and the conveyance will be accomplished by entering the name of each owner in the register. The Act cannot come into operation until the 1st of July, 1898. And it will not then apply to the whole of England at once; but will be imposed by the Privy Council in one county council area as an experiment (probably London), and will then, if the experiment prove successful, be gradually applied to county after county. It will still be necessary to employ a solicitor to do the work of registration.

The remarks that I have made about the necessity of engaging legal assistance in the purchase of land apply equally to mortgages of land. If you

wish either to borrow or lend money on mortgage of landed property, be sure to have a proper legal mortgage drawn up by a solicitor. This advice is more especially for the benefit of the lender. And when the borrower repays the loan, let him be certain to have a proper deed of re-conveyance also drawn up by a solicitor. For he does not get his land back simply by repaying the money.

I reiterate that it is the falsest kind of economy to save lawyers' charges on these occasions. The absence of proper deeds is sure to hurt everybody concerned before long. I remember a case in which a man bought a plot of land in the country and paid for it, without having a deed of conveyance. When he died it became necessary for his trustees to sell the property. They found a purchaser at a very fair price; but this purchaser was far too wise to buy the land from the trustees in the same way that the deceased had bought it. This purchaser wanted to know that he was buying from somebody who had a right to sell—from somebody who had, as lawyers say, a good title.

Well, it was impossible for the trustees to show that their testator ever was the owner of the property. And so the purchase went off, and the trustees had to pay damages to the would-be purchaser. Ultimately those trustees had to go into the market on these terms: They said, "We want to sell a piece of land. We have every reason to believe that our testator was the owner of it. We can prove that he paid £700 to Mr. Blank about ten years ago, and that since that time our testator occupied the land. But Mr. Blank is dead. We cannot find any receipt. What price will anybody offer?" Ultimately somebody bought it for an old song—about £150, or one-fourth of its value. And even then the purchaser felt that he was doing a risky thing; for he was buying land without a title—a "pig in a poke" with a vengeance. In twelve years' time he would acquire a title simply by length of occupation; but up to that time he would be liable to find himself shot at by the heirs of the man who sold it without giving a conveyance. This is a true and veracious narrative drawn from my own experience. I could give names and places, but as I was consulted in the matter, professional etiquette forbids the disclosure.

Just one more word. It is not necessary to call in a solicitor until you have fixed the price, and so on. You should first of all make a contract, and *make it in writing*, in this fashion:—

"Jan. 1st, 1898.

"It is hereby agreed between us the undersigned that Abram Trepén sells and Arthur Polgar buys the plot of land known as Five Acre Piece, now in the occupation of Abram Trepén, at the price of £500.

	6d.
"ABRAM TREPÉN.	Stamp
"ARTHUR	POLGAR."

If you live far away from a place where a lawyer has an office, remember that the resources of civilisation are not yet exhausted, and that Rowland



Hill established the penny post for your especial benefit. Four ounces can be sent for the trifling sum of one penny. Write to a solicitor and tell him that you wish him to prepare a conveyance of the property to you, and to act for both parties; and send him all the deeds of the property, which you procure from the vendor. You should give the solicitor the full names and addresses of vendor and purchaser, and the price agreed on. Also send him a copy of the written agreement above mentioned.

If I can induce my country readers, and others through them, to have this part of their business done by proper hands, the *Family Lawyer* will not have been written in vain. And when you think of it, 'tis as foolish to entrust legal business to the village schoolmaster as it would be to expect the parson to cure you of the small-pox.

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